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IN THE

Supreme Court of the United States

MISSOURI PUBLIC SERVICE COMMISSION; JEFF DAVIS; CONNIE MURRAY; ROBERT M. CLAYTON III; TERRY JARRETT; KEVIN GUNN, in their official capacities as Commissioners of the Missouri Public Service Commission and not as individuals,
Petitioners,

v.

SOUTHWESTERN BELL TELEPHONE, L.P., doing business as SBC MISSOURI,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Eleventh Circuit is correct that a State commission conducting an interconnection arbitration under Section 252(b)(1) of the Telecommunications Act of 1996 ("the Act") has authority under federal law to require an incumbent local exchange carrier and Bell Operating Company to permit a requesting carrier to commingle wholesale services obtained pursuant to Section 271(b)(2)(B) with leased unbundled network elements it obtained pursuant to Section 251(c)(3) of the Act, or is the Eighth Circuit correct that a State commission has no such authority?

PARTIES TO THE PROCEEDINGS

The petitioners in this Court are the Missouri Public Service Commission, and Jeff Davis, Connie Murray, Robert M. Clayton III[1], Terry Jarrett, and Kevin Gunn in their official capacities as commissioners of the Missouri Public Service Commission and not as individuals.[1]

The respondent who was the appellee below is Southwestern Bell Telephone, L.P., doing business as SBC Missouri, which is now Southwestern Bell Telephone Company, doing business as AT&T Missouri.

Additional respondents who were parties in the consolidated case before the court of appeals below are Big River Telephone Company, LLC; NuVox Communications of Missouri, Inc.; Socket Telecom, LLC; XO Communications Services, Inc.; Xspedius Management Co. of Kansas City, LLC; Xspedius Management Co. Switched Services, LLC; and Sprint Communications Company, L.P.[2]

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[1] Two Commissioners who were parties in the appeal below, Steve Gaw and Linward Appling, are no longer serving, and have been replaced by Commissioners Kevin Gunn and Terry Jarrett.

[2] Several parties in the District Court case below: Birch Telecom of Missouri, Inc., Ionex Communications, Inc., XO Missouri, Inc., Charter Fiberlink-Missouri, LLC, Navigator Telecommunications, LLC, WilTel Local Network, LLC, MCI Communications Services, Inc. and MCImetro, LLC, were listed in the consolidated Court of Appeals' case caption but did not actually participate in the Court of Appeals proceeding through filing a brief. Therefore, they have not been included in the caption of this Petition, or listed as respondents. Petitioners will serve these non-participants with the Petition to ensure they have notice that it was filed.

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47 C.F.R. § 51.309 (2008) 8, 9, 10, 12

MISCELLANEOUS:

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IN THE

Supreme Court of the United States

No. 08-___

MISSOURI PUBLIC SERVICE COMMISSION; JEFF DAVIS; CONNIE MURRAY; ROBERT M. CLAYTON III; TERRY JARRETT; KEVIN GUNN, in their official capacities as Commissioners of the Missouri Public Service Commission and not as individuals,

Petitioners,

v.

SOUTHWESTERN BELL TELEPHONE, L.P., doing business as SBC MISSOURI,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

The Missouri Public Service Commission and Commissioners Jeff Davis, Connie Murray, Robert M. Clayton III, Terry Jarrett and Kevin Gunn, in their official capacities, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Eighth Circuit published on June 20, 2008, *Southwestern Bell Telephone, L.P. v. Missouri Public Service Commission,* is reported at 530 F. 3d 676 and is reproduced in Appendix A. The opinion of the United States District Court, *Southwestern Bell Telephone, L.P. v. Missouri Public Service Commission,* is reported at 461 F. Supp. 2d 1055 (E.D. Mo. Sept. 14, 2006) and is reproduced in Appendix B. The Missouri Public Service Commission's Arbitration Order, *Southwestern Bell Telephone, L.P., d/b/a SBC Missouri's Petition for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection Agreement to the Missouri 271 Agreement ("M2A"),* currently appears online as 2005 WL 1949838 (July 11, 2005) ("Arbitration Order") and is reproduced in Appendix C. The Commission Order incorporates by reference the Final Arbitrator's Report.[1]

JURISDICTION

The Court of Appeals entered its judgment on June 20, 2008. The Court of Appeals denied petitions for rehearing on July 25, 2008. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Relevant sections of the Telecommunications Act of 1996 and the Code of Federal Regulations are reproduced in Appendix D.

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[1] Appendix C contains an excerpt of the Final Arbitrator's Report that addresses issues relevant to this Petition. The full Report, which is approximately 2000 pages, will be furnished upon request.

STATEMENT OF THE CASE

The Missouri Public Service Commission (MPSC) is the State commission which has regulatory authority under the laws of the State of Missouri over the intrastate operations of telecommunications carriers.

Southwestern Bell Telephone, L.P., d/b/a SBC Missouri (SBC) is an incumbent local exchange carrier (ILEC) and successor Bell Operating Company (BOC) providing intrastate telecommunications service in Missouri.

For years, local telephone service was presumed to be a natural monopoly. State commissions granted an exclusive franchise to one local exchange carrier ("LEC") to provide service within a local service area. The LEC owned the local network, including local loops, switches and transport facilities needed to transmit calls between customers.

As technology evolved, competition among multiple local service providers became more feasible. Congress enacted the Telecommunications Act of 1996, Pub.L. 104-104, 100 Stat. 56 ("the Act") (codified as amended in scattered sections of 47 U.S.C.) to promote local service competition, fundamentally restructuring local service markets as well the federal and State governments' shared responsibility for telecommunications service regulation.

In the Act, Congress generally required all telecommunications carriers to interconnect with the facilities and equipment of other telecommunications carriers. 47 U.S.C. § 251(a). At the same time, it placed additional obligations on local exchange carriers that formerly held monopolies, now called "incumbent local exchange carriers" ("ILECs"). 47 U.S.C. § 251(c). Congress required ILECs to aid com-

petitive local exchange carriers ("CLECs") through the provision of additional services and interconnection arrangements. *Id.* For example, ILECs had to lease parts of their network (network elements) on an "unbundled" (separate) basis to "impaired" CLEC competitors, so that competitors would not have to build whole new networks to enter the local market. 47 U.S.C. § 251(d)(2)(B). 530 F. 3d at 680.

ILECs that were part of the prior Bell System network ("Bell Operating Companies" or "BOCs") had additional duties. 47 U.S.C. § 271. Under § 271(c)(2)(B), BOCs wishing to enter the long distance market in a given State had to demonstrate they had, in addition to complying with § 251, made additional network facilities listed in a "competitive checklist" available to CLECs. 47 U.S.C. § 271(c)(2)(B). 530 F. 3d at 681.

In Section 252 of the Act, Congress established procedures for agreements governing ILECs' interconnection with CLECs. 47 U.S.C. § 252. An ILEC could privately negotiate an agreement. 47 U.S.C. § 252(a). However, if private negotiations failed, either party could petition the State commission that regulated local telephone service to arbitrate open issues. 47 U.S.C. § 252 (b)(1).

Congress gave certain responsibilities to the federal regulatory agency that regulated interstate telecommunications service, the Federal Communications Commission (FCC), and others to State commissions in the new competitive regulatory scheme. For example, the FCC was responsible for adopting general rules implementing Section 251. 47 U.S.C. § 251(d). In this role, it directed ILECs to offer specific unbundled network elements ("UNEs") to competitors, and set a lower cost-based methodol-

ogy for pricing the elements, based on "total element long-run incremental cost" ("TELRIC"). 530 F. 3d at 680.

On the other hand, States were responsible for conducting arbitrations between individual carriers. 47 U.S.C. 252(b). In particular, Congress directed States to ensure in each arbitration that the carriers' interconnection terms met Section 251's requirements, including any regulations that the FCC had adopted under Section 251. 47 U.S.C. § 252(c)(1).

SBC (an ILEC) attempted to negotiate interconnection agreements with several CLECs in Missouri as required by the Act. When those negotiations failed, the dispute was submitted to arbitration before the MPSC as provided for under Section 252(b). 530 F. 3d at 679. The Missouri Arbitrator issued a Final Report in Case No. TO-2005-0336 on June 21, 2005, excerpted in Appendix C. On July 11, 2005, the MPSC adopted the Arbitrator's Final Report as its decision on each unresolved issue, except as it expressly modified the Report.[2] Arbitration Order, p. 9, Appendix C.

SBC petitioned the district court for review. The district court's jurisdiction was based on 47 U.S.C. § 252(e)(6), which provides that any party aggrieved by a State commission determination under Section 252 may bring an action in an appropriate Federal district court. SBC argued that the MPSC exceeded its authority by ordering SBC to allow CLECs broader access to its facilities network than mandated by the Act. SBC also argued the MPSC erred

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[2] The issues presented in this Petition were resolved in the Arbitrator's Final Report and were not modified by the Commission in its Arbitration Order.

in ordering it to provide CLECs access to its entrance facilities at cost. 530 F. 3d at 679-80.

The district court found the MPSC exceeded its authority when it decided issues relating to which network facilities SBC was required to make available to CLECs. The district court also agreed with SBC's contention that the MPSC's requirement that SBC combine switching, which is only required by Section 271, with facilities required under Section 251 creates the same substantive combinations as the UNE Platform and is directly contrary to the FCC's holding in its 2005 Triennial Review Remand Order. Order on Remand, *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* 20 F.C.C.R. 2533 (2005). ("Triennial Review Remand Order") The district court affirmed the MPSC's decision setting the rate SBC could charge CLECs for entrance facilities needed for interconnection. 530 F. 3d at 680.

On appeal to the Eighth Circuit, the MPSC and various CLECs argued that the district court erred in concluding the MPSC exceeded its authority. In its cross-appeal, SBC argued that the district court erred in setting the rate it could charge for access to entrance facilities. The court of appeals affirmed the district court order. 530 F. 3d at 680. The court concluded that the FCC has exclusive jurisdiction over Section 271. 530 F. 3d. at 683.

The court noted that the FCC held prior to 2005 that ILECs were required to make all basic elements of their local networks (Unbundled Network Elements-Platform (UNE or UNE-Platform)) available to CLECs at TELRIC rates under Section 251. Courts reviewing the FCC's orders, however, dis-

agreed when the practice caused the competition pendulum to swing too far in favor of CLECs. *See, e.g., AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 390 (1999). In 2005, the FCC issued its Triennial Review Remand Order, which no longer required ILECs to make all elements of their local networks available under § 251 at TELRIC rates. 530 F. 3d at 680-81 (citation omitted).

Thus, prior to 2005, § 271 compliance was not a contentious issue because the FCC's interpretation of § 251 essentially required ILECs to provide § 271(c)(2)(B) "competitive checklist" network facilities as part of the § 251 interconnection agreements. It did not matter whether States had authority to force ILECs to comply with § 271, because they could order the same level of compliance by enforcing § 251. After the FCC issued its 2005 Triennial Review Remand Order reducing the number of network facilities ILECs were required to make available to CLECs, States and CLECs began exploring whether ILECs could be required to provide the § 271 "competitive checklist" network facilities in a § 252 arbitration. 530 F. 3d at 681.

The Eighth Circuit framed the issue as the authority of the States to enforce § 271. The Eighth Circuit held that the plain language of § 271 makes it clear that States have no authority to interpret or enforce the obligations of § 271. 530 F. 3d at 682-83.

REASONS FOR GRANTING WRIT OF CERTIORARI

The decision of the Eighth Circuit Court of Appeals is in conflict with the decision of another United States Court of Appeals on the same important matter, *NuVox Communications, Inc. v. BellSouth*

Communications, Inc., 530 F. 3d 1330 (11th Cir. 2008), ("*NuVox*"), reproduced in Appendix E. This Petition presents a key issue of State responsibility for implementing the Act: States' obligation to ensure each arbitrated interconnection agreement is consistent with FCC rules adopted under Section 251.

In *NuVox*, the Eleventh Circuit Court of Appeals framed the issue differently and reached the opposite conclusion. It held that federal law requires an ILEC to permit a requesting carrier to commingle[3] competitive checklist facilities that must be provided under § 271(c)(2)(B) with unbundled network elements that must be provided under § 251(c)(3). 530 F. 3d at 1333.

The *NuVox* case also arose from an arbitration decision of a State commission. The Florida Public Service Commission had originally concluded that BellSouth did not have to permit requesting carriers to commingle competitive checklist facilities with unbundled network elements. However, the district court reversed that decision on review. It found that under FCC Rule 51.309(e), an ILEC must permit a requesting carrier to commingle UNEs with wholesale services it obtains from the ILEC. 47 C.F.R. § 51.309(e). The lower court found that the competitive checklist elements could be commingled with unbundled network elements in an interconnection

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[3] The FCC has defined "commingling" as "the connecting . . . of a UNE or a UNE combination to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC." Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 F.C.C.R. 16978, 17342, ¶ 579 (2003) ("Triennial Review Order").

arrangement since the FCC had classified Section 271 elements as wholesale services. The Eleventh Circuit affirmed the district court's decision on this key basis. 530 F. 3d. at 1333.

The Eleventh Circuit observed that the FCC has, on several occasions, made clear that § 271 elements are "wholesale." 530 F.3d at 1333. It cited to the FCC's Triennial Review Order on this point, as well as three separate FCC cases. It noted that BellSouth could not identify any evidence to suggest that § 271 elements were not wholesale services or facilities. Consequently, it concluded the commingling requirement of Rule 51.309 applies to § 271 elements. 530 F. 3d. at 1333-34.

The Eleventh Circuit also rejected BellSouth's contention that requiring commingling of § 251 and § 271 elements would essentially revive the UNE Platform. The FCC eliminated the UNE Platform as anti-competitive because it allowed competitive LECs to obtain all the necessary elements for a telecommunications network from incumbent LECs at a lower cost than they would incur if they developed the facilities on their own. The court noted that ILECs are permitted to charge market-based rates for § 271 elements, making them distinguishable from the cost-based facilities mandated under the original UNE platform. 530 F. 3d. at 1335.

In contrast to the Eleventh Circuit, the Eighth Circuit completely overlooked the directive of FCC Rule 51.309 which States must apply in an arbitration proceeding. Section 252 of the Act, 47 U.S.C. § 252(c)(1), mandates that a State commission, in resolving an arbitration and imposing conditions upon the parties to the agreement, shall "*ensure* that such resolution and conditions meet the require-

ments of section 251, *including the regulations prescribed by the Commission pursuant to section 251.*" (Emphasis added). Section 252 also grants the State commission the authority to ensure this result. Section 252(e)(2)(B) provides that a State commission may only reject "an agreement (or any portion thereof) adopted by arbitration under subsection (b) if it finds that the agreement does not meet the requirements of Section 251, *including the regulations prescribed by the Commission pursuant to section 251*, or the standards set forth in subsection (d) of this section." (Emphasis added).

The FCC prescribed Rule 51.309(e) pursuant to § 251(c)(3). Triennial Review Order, 18 F.C.C.R. at 17344-47, ¶¶ 581-584. Therefore, States must ensure in arbitration proceedings that carriers' interconnection terms are consistent with this commingling rule.

The issue is important because it goes to the heart of States' responsibilities for implementing interconnection rules in individual carrier arbitrations. In arbitrations, the FCC's rules are applied in practice to govern actual interconnection arrangements. States cannot permit an arbitrated agreement to go into effect if it is inconsistent with Rule 51.309 or any other rule the FCC adopted under Section 251. The Eleventh Circuit affirmed the importance of enforcement of Rule 51.309, while the Eighth Circuit failed to acknowledge the directive of FCC Rule 51.309 at all.

Moreover, if the Court does not resolve the difference in the Circuit opinions, it will undermine Congress' careful scheme for dual federal/state responsibilities for implementing the Act's requirements.

Under the Eighth Circuit decision, States cannot address ILEC obligations for offering competitive checklist facilities with other leased elements in any arbitration proceeding, even though the FCC has expressly classified Section 271 facilities and services as wholesale. Consequently, a CLEC would have to look to the FCC for a remedy if it needed to incorporate those facilities in its leased interconnection arrangements. Congress expressly rejected this result, because it directed States to ensure carrier interconnection agreements were consistent with Section 251 and the FCC's implementing regulations in State arbitration proceedings. On the other hand, in the Eleventh Circuit, parties can properly address commingling of unbundled network elements and Section 271 wholesale services in State interconnection arbitration proceedings.

Thus, the two court decisions create an inconsistent regulatory scheme, contrary to Congress' intent in creating a unified national regulatory structure.

CONCLUSION

FCC Rule 51.309(e) requires that an incumbent LEC shall permit a requesting telecommunications carrier to commingle an unbundled network element or a combination of unbundled network elements with wholesale services obtained from the incumbent LEC.

The Eighth Circuit failed to recognize the MPSC's statutory duty and authority under Section 252(c)(1) and Section 252(e)(2)(B) to ensure that an arbitrated agreement meets the requirements of Rule 51.309(e). The Eleventh Circuit correctly recognized the Florida Commission's authority under this statute and then correctly concluded that § 271 elements are wholesale services under Rule 51.309(e).

The Petitioners urge this Honorable court to grant a writ of certiorari to correct the error of law of the lower court and to resolve the conflict of law that exists in the circuit courts.

Respectfully submitted.

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October 2008

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 06-3701

SOUTHWESTERN BELL TELEPHONE, L.P., doing business as SBC MISSOURI,
Plaintiff - Appellee,

v.

MISSOURI PUBLIC SERVICE COMMISSION; JEFF DAVIS; CONNIE MURRAY; STEVE GAW; ROBERT M. CLAYTON III; LINWARD APPLING, in their official capacities as commissioners of the Missouri Public Service Commission and not as individuals,
Defendants,

BIG RIVER TELEPHONE COMPANY, LLC,
Defendant - Appellant,

BIRCH TELECOM OF MISSOURI, INC.; IONEX COMMUNICATIONS, INC.,
Defendants,

NUVOX COMMUNICATIONS OF MISSOURI, INC.; SOCKET TELECOM, LLC; XO COMMUNICATIONS SERVICES, INC.; XO MISSOURI, INC.; XSPEDIUS MANAGEMENT CO. OF KANSAS CITY, LLC; XSPEDIUS MANAGEMENT CO. SWITCHED SERVICES, LLC,
Defendants - Appellants,

CHARTER FIBERLINK–MISSOURI, LLC; NAVIGATOR TELECOMMUNICATIONS, LLC; WILTEL LOCAL NETWORK, LLC; MCI COMMUNICATIONS SERVICES, INC.; MCIMETRO, LLC,
Defendants,

SPRINT COMMUNICATIONS COMPANY, L.P.,
Defendant - Appellee.

VERIZON NEW ENGLAND, INCORPORATED; VERIZON NEW YORK, INCORPORATED; VERIZON PENNSYLVANIA, INCORPORATED; VERIZON MARYLAND, INCORPORATED; VERIZON WASHINGTON, INCORPORATED; VERIZON VIRGINIA, INCORPORATED,
Amici on Behalf of Appellee Southwestern Bell Telephone, L.P., doing business as SBC Missouri.

No. 06-3726

SOUTHWESTERN BELL TELEPHONE, L.P., doing business as SBC MISSOURI,
Plaintiff - Appellee,

v.

MISSOURI PUBLIC SERVICE COMMISSION; JEFF DAVIS; CONNIE MURRAY; STEVE GAW; ROBERT M. CLAYTON III; LINWARD APPLING, in their official capacities as commissioners of the Missouri Public Service Commission and not as individuals,
Defendants - Appellants,

BIG RIVER TELEPHONE COMPANY, LLC; BIRCH TELECOM OF MISSOURI, INC.; IONEX COMMUNICATIONS, INC.; NUVOX COMMUNICATIONS OF MISSOURI, INC.; SOCKET TELECOM, LLC; XO COMMUNICATIONS SERVICES, INC.; XO MISSOURI, INC.; XSPEDIUS MANAGEMENT CO. OF KANSAS CITY, LLC; XSPEDIUS MANAGEMENT CO. SWITCHED SERICES, LLC; CHARTER FIBERLINK–MISSOURI, LLC;

NAVIGATOR TELECOMMUNICATIONS, LLC; SPRINT COMMUNICATIONS COMPANY, L.P.; WILTEL LOCAL NETWORK, LLC; MCI COMMUNICATIONS SERVICES, INC.; MCIMETRO, LLC,

Defendants.

No. 06-3727

SOUTHWESTERN BELL TELEPHONE, L.P., doing business as SBC MISSOURI,

Plaintiff - Appellant,

v.

MISSOURI PUBLIC SERVICE COMMISSION; JEFF DAVIS; CONNIE MURRAY; STEVE GAW; ROBERT M. CLAYTON III; LINWARD APPLING, in their official capacities as commissioners of the Missouri Public Service Commission and not as individuals; Big River Telephone Company, LLC,

Defendants - Appellees,

NUVOX COMMUNICATIONS OF MISSOURI, INC.; SOCKET TELECOM, LLC; XO COMMUNICATIONS SERVICES, INC.; XO MISSOURI, INC.; XSPEDIUS MANAGEMENT CO. OF KANSAS CITY, LLC; XSPEDIUS MANAGEMENT CO. SWITCHED SERVICES, LLC,

Defendants - Appellees,

SPRINT COMMUNICATIONS COMPANY, L.P.,

Defendant - Appellee,

BIRCH TELECOM OF MISSOURI, INC; IONEX COMMUNICATIONS, INC.,

Defendants,

CHARTER FIBERLINK–MISSOURI, LLC; NAVIGATOR TELECOMMUNICATIONS, LLC,

Defendants,

WILTEL LOCAL NETWORK, LLC;
MCI COMMUNICATIONS SERVICES, INC.;
MCIMETRO, LLC,
Defendants.

Submitted: June 14, 2007
Filed: June 20, 2008

Before BYE, RILEY, and BENTON,[1] *Circuit Judges.*

BYE, *Circuit Judge.*

Southwestern Bell Telephone, L.P., d/b/a SBC Missouri (SBC), attempted to negotiate interconnection agreements with several competitors (Competing Local Exchange Carriers (CLEC)) as required by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.). When those negotiations failed, the dispute was submitted to arbitration as provided for under the Act and the resulting arbitrator's decision was adopted by the Missouri Public Service Commission (MPSC). SBC petitioned the district court[2] for review, arguing the MPSC exceeded its authority by ordering SBC to allow CLECs broader access to its facilities network than mandated by the Act. SBC also argued the MPSC erred in ordering it to provide CLECs access to entrance facilities at cost. The district court found the

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[1] Judge Duane Benton recused himself from further participation in this case following oral argument and did not participate in the decision. Pursuant to 8th Cir. R. 47E, the two remaining judges on the panel have decided the case.

[2] The Honorable Charles A. Shaw, United States District Judge for the Eastern District of Missouri.

MPSC exceeded its authority when it decided issues relating to which network facilities SBC was required to make available to CLECs. The district court affirmed the MPSC's decision setting the rate SBC could charge CLECs for entrance facilities needed for interconnection. On appeal, the MPSC and various CLECs argue the district court erred in concluding the MPSC exceeded its authority. In its cross-appeal, SBC argues the district court erred in setting the rate it could charge for access to entrance facilities. We affirm.

I

For years, local telephone service was provided by companies holding monopolies which were subject to regulation by local governments. In passing the Telecommunications Act of 1996, Congress chose to encourage competition among telephone service providers and to impose greater federal regulation. The Act requires existing telephone companies, which previously held monopolies (Incumbent Local Exchange Carriers (ILEC)), to make their local facilities or networks available to newcomers—CLECs—for a fee, if the CLEC's ability to provide service was "impaired" without access. This appeal focuses on two sections of the Act which implemented these requirements—47 U.S.C. §§ 251 and 271.

Under § 251, all ILECs are required to negotiate interconnection agreements with impaired CLECs and to lease certain of their network facilities at cost-based rates known as "total element long-run incremental cost" (TELRIC). If an agreement cannot be negotiated, the Act requires unresolved § 251 disputes be submitted to arbitration. Section 251 compliance, including the arbitration process, is subject to oversight by state public service commissions.

Prior to 2005, the Federal Communications Commission (FCC) took the position ILECs were required under § 251 to make all basic elements of their local networks (Unbundled Network Elements-Platform (UNE or UNE-Platform)) available to CLECs at TELRIC rates. Courts reviewing the FCC's orders, however, disagreed when the practice caused the competition pendulum to swing too far in favor of CLECs. *See, e.g., AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 390 (1999) ("[I]f Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the Commission has come up with . . . . It would simply have said . . . whatever requested element can be provided must be provided."); *U.S. Telecom Ass'n v. FCC*, 290 F.3d 415, 424 (D.C. Cir. 2002) ("If parties who have not shared the risks are able to come in as equal partners on the successes, and avoid payment for the losers, the incentive to invest plainly declines."); *Verizon New England, Inc. v. Maine Pub. Utils. Comm'n*, 509 F.3d 1, 9 (1st Cir. 2007) ("[M]aking a monopolist share . . . 'essential facilities' can promote competition; but it can also retard investment, handicap competition detrimentally, and discourage alternative means of achieving the same result that could conceivably enhance competition . . . ."). In 2005, the FCC issued its Triennial Review Remand Order (TRRO), which no longer required ILECs to make all elements of their local networks available under § 251 at TELRIC rates. *See* Order on Remand, *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 F.C.C.R. 2533 (2005).

The TRRO also concluded CLECs were no longer impaired with respect to "entrance facilities" and ILECs were not required to provide such facilities as

UNEs at TELRIC rates. An entrance facility is a connection between a switch maintained by an ILEC and a switch maintained by a CLEC. It is a means of transferring traffic from one carrier's network to another's, and facilitates an ILEC's obligation under the Act to interchange traffic among networks. CLECs also use entrance facilities to route customer traffic between a CLEC's customer and the CLEC's switch—a practice known as "backhauling." When used to transfer traffic from one network to another, entrance facilities are used for interconnection purposes. When used for backhauling, they are not used for interconnection. The TRRO found CLECs did not need entrance facilities for backhauling CLEC to CLEC traffic. Conversely, the TRRO reiterated that ILECs are required to provide entrance facilities at TELRIC rates under § 251(c)(2) if necessary for interconnection purposes.

In addition to § 251, which applies to all ILECs, § 271 imposes additional requirements on ILECs previously part of the Bell network (Bell Operating Companies (BOC)). Under § 271, BOCs wishing to enter the long-distance market must demonstrate they have, in addition to complying with § 251, made additional network facilities listed in a "competitive checklist" available to CLECs. Unlike § 251, the language of § 271 expressly states § 271 compliance is determined by the FCC.

Prior to 2005, § 271 compliance was not a contentious issue because the FCC's interpretation of § 251 required ILECs to provide § 271 network facilities as part of the § 251 agreements. It did not matter whether states had authority to force ILECs to comply with § 271, because they could order the same level of compliance by enforcing § 251. After the FCC

issued its 2005 TRRO reducing the number of network facilities ILECs were required to make available, states and CLECs began exploring whether ILECs could be required to provide the same network facilities, i.e., the UNE-Platform, by enforcing the competitive checklist requirements of § 271. That brings us to the primary issue in this case—the authority of states to enforce § 271.

After the Act was passed, SBC negotiated § 251 agreements with various CLECs and complied with the additional requirements of § 271. As SBC and the CLECs were in the process of renegotiating their § 251 agreements, the FCC issued its 2005 TRRO reducing the number of network facilities ILECs were required to make available. As a result, SBC refused to offer its UNE-Platform, leading to an impasse in § 251 negotiations. SBC took the position it no longer had to offer the full UNE-Platform at TELRIC rates. The CLECs contended, even though the § 251 requirements had changed, SBC could be required to make the same network facilities available under § 271.

SBC and the CLECs were unable to reach an agreement and the dispute was submitted to arbitration. The arbitrator, while recognizing he had no authority under § 251 to order SBC to make the disputed network facilities available, ordered them to be provided under § 271. Despite language in § 271 granting the FCC exclusive authority over § 271 disputes, the arbitrator held the states have implied authority to ensure ILECs comply with § 271. The arbitrator also held SBC was required to make its entrance facilities available to CLECs for interconnection purposes at TELRIC rates. The MPSC adopted the arbitrator's order. SBC appealed to the

district court arguing the MPSC exceeded its authority when it ordered SBC to provide the disputed network facilities under § 271.

The district court affirmed in part, and reversed in part. It held the MPSC exceeded its authority by ordering the disputed network facilities provided under § 271, but affirmed the MPSC's decision setting the rate SBC could charge for entrance facilities needed for interconnection. On appeal, the MPSC and CLECs argue the structure of the Act implies Congress granted the states implicit authority to enforce § 271. SBC argues the FCC—not the states—has sole authority to enforce § 271. In its cross-appeal, SBC argues the Act no longer requires it to make entrance facilities available at TELRIC rates. Alternatively, assuming it must provide access for interconnection purposes, SBC argues the MPSC erred in finding the CLECs were using the entrance facilities for interconnection, and not backhauling.

II

We review the MPSC's interpretation and application of federal law de novo and will set aside its findings of fact only if they are arbitrary and capricious. *WWC License, L.L.C. v. Boyle*, 459 F.3d 880, 889-90 (8th Cir. 2006). The parties agree this appeal involves the interpretation and application of federal law and de novo review applies.

The MPSC and CLECs concede the states have no authority to enforce § 271. Nonetheless, they contend Congress granted implicit authority by virtue of how the Act is structured. They argue the Act requires ILECs to enter into § 251 agreements with CLECs and those agreements are subject to mandatory state approval. They further argue ILECs seeking § 271

approval must, as a precondition, demonstrate they have obtained state approval of their § 251 agreements. Thus, a state can defeat an ILEC's attempt to win § 271 approval by withholding § 251 approval. They contend this ability to hamstring an ILEC's attempt to obtain § 271 approval means Congress intended to grant the states implicit authority to enforce § 271.

> Sections 251-52 provide for a dual federal-state regime: the FCC determines what UNE elements must be provided and sets pricing policy; state commissions oversee the adoption of agreements . . . providing such UNEs to competitors at prices based on those principles. 47 U.S.C. § 252(a), (b), (e), (f). Disputes as to the adoption of the agreements submitted to state commissions go to federal, rather than state, court for review, *id.* § 252(e), although implementation issues may arise in state proceedings. In short, the states have a major role under these sections.

Verizon New England, Inc., 509 F.3d at 7.

Conversely, the plain language of § 271 makes clear states have no authority to interpret or enforce the obligations of § 271. Section 271 contemplates two administrative determinations and Congress assigned both to the FCC. First, a BOC seeking § 271 approval must "apply to the Commission"—the FCC—and "the Commission" "shall issue a written determination approving or denying the authorization requested" after "[t]he Commission" determines whether the specified criteria, including the competitive checklist, are satisfied. § 271(d)(1), (3); 271(c)(2)(B).

Second, the FCC must address any enforcement issues. "The Commission shall establish procedures

for the review of complaints" alleging a BOC is not complying with § 271; "the Commission shall act on such [a] complaint within 90 days"; and "the Commission may" take action to enforce the requirements of § 271 if "the Commission determines" a BOC is not in compliance with its obligations under § 271. § 271(d)(6).

Unlike the authority granted states under § 251, Congress only gave states an advisory role at the application stage of the § 271 process. The FCC is to "consult with the State commission of any State that is the subject of" a § 271 application before the FCC rules on the application. § 271(d)(2)(B). The FCC need not "give the State commissions' views any particular weight." *SBC Commc'ns Inc. v. FCC*, 138 F.3d 410, 416 (D.C. Cir. 1998). Moreover, Congress did not grant states even an advisory role in addressing post-approval compliance issues. § 271(d)(6). "[A]ny complaint by [a CLEC] that [a BOC's] failure to provide [a certain form of network access] will violate § 271 is an issue for the FCC, not for [a state commission]." *Dieca Commc'ns, Inc. v. Florida Pub. Serv. Comm'n*, 447 F. Supp. 2d 1281, 1286 (N.D. Fla. 2006); *see BellSouth Telecomms., Inc. v. Mississippi Pub. Serv. Comm'n*, 368 F. Supp. 2d 557, 566 (S.D. Miss. 2005). A state's role under § 271 is "limited" to "issuing a recommendation" regarding a § 271 application, and a state commission may not "parlay [its] limited role" into the authority to impose substantive requirements exclusively the prerogative of the FCC. *Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm'n*, 359 F.3d 493, 497 (7th Cir. 2004).

"The contrast [between the language in §§ 251, 252, and 271] confirms that when Congress envisaged state commission power to implement the statute, it

knew how to provide for it." *Verizon New England, Inc.*, 509 F.3d at 7. Accordingly, we join those federal courts which have concluded the FCC has exclusive jurisdiction over § 271. *See, e.g., Id.* at 7-8 (noting the majority of federal courts and state public service commissions treat § 271 as within the exclusive authority of the FCC); *Indiana Bell Tel. Co.*, 359 F.3d at 495 ("The Act reserves to the FCC the authority to decide whether to grant a section 271 application.").

In its cross-appeal, SBC argues the district court erred in affirming the MPSC's order holding CLECs are entitled to access SBC's entrance facilities for interconnection purposes at TELRIC rates. SBC argues the order conflicts with FCC rulings holding CLECs are no longer impaired with respect to entrance facilities and not entitled to them as UNEs.

The MPSC acknowledged the FCC's ruling stating CLECs are not entitled to entrance facilities as UNEs, but required SBC to allow access pursuant to § 251(c)(2), which requires ILECs to provide interconnection to CLECs. The District Court concluded the MPSC's order correctly implemented the FCC's rulings. Further, it rejected SBC's argument the FCC only requires an ILEC to allow CLECs to interconnect with its network but does not require it to lease the interconnection facilities themselves.

The FCC has held CLECs are not impaired without access to entrance facilities and are not entitled to entrance facilities as UNEs under § 251(c)(3). The FCC's finding of non-impairment does not, however, alter the right of CLECs to obtain interconnection facilities pursuant to § 251(c)(2) for transmission and routing of telephone exchange service and exchange access service, i.e., CLEC to ILEC and ILEC to CLEC traffic. The FCC determined when a CLEC uses

entrance facilities to carry traffic to and from its own end users, i.e., backhauling or CLEC to CLEC, the CLEC is not entitled to obtain entrance facilities as UNEs at TELRIC rates. If a CLEC needs entrance facilities to interconnect with an ILEC's network, it has the right to obtain such facilities from the ILEC. Thus, CLECs must be provided access at TELRIC rates if necessary to interconnect with the ILEC's network. *See Illinois Bell Tel. Co. v. Box*, Nos. 07-3557, 07-3683, 2008 WL 2151573, at 2-3 (7th Cir. May 23, 2008).

Additionally, "interconnection" means the physical linking of two networks for the mutual exchange of traffic. The term "interconnect" refers to "'facilities and equipment,' not to the provision of any service." *AT&T Corp. v. FCC*, 317 F.3d 227, 234-35 (D.C. Cir. 2003) (interpreting the term interconnect in § 251(a)(1)); *see Competitive Telecomms Ass'n v. FCC*, 117 F.3d 1068, 1072 (8th Cir. 1997) (stating interconnection as used in § 251(c)(2) means "a physical link between the equipment of the carrier seeking interconnection and the LEC's network.").

The MPSC found, and the district court agreed, the entrance facilities requested by the CLECs would be used solely for interconnection purposes within the meaning of § 251(c)(2). Nothing in the record suggests the finding was arbitrary or capricious. Further, the district court correctly concluded SBC was required to provide a physical link to CLECs for access to its entrance facilities as necessary for interconnection at TELRIC rates.

IV

The judgment of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:05-CV-1264 CAS

SOUTHWESTERN BELL TELEPHONE, L.P.,
d/b/a SBC MISSOURI,
Plaintiff,

v.

THE MISSOURI PUBLIC SERVICE COMMISSION, *et al.*,
Defendants.

MEMORANDUM AND ORDER

This action was filed by Southwestern Bell Telephone, L.P., d/b/a SBC Missouri ("SBC") seeking declaratory and injunctive relief under the Federal Telecommunications Act of 1996.[1] The matter is before the Court on a motion to dismiss for lack of subject matter jurisdiction, two motions to strike, and motions for summary judgment filed by SBC and defendants Sprint Communications Company, L.P. and Charter Fiberlink-Missouri, LLC. The Court concludes that it has subject matter jurisdiction over this action, the motions to strike should be denied,

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[1] The Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

After this action was filed, SBC Communications, the parent company of plaintiff Southwestern Bell Telephone, L.P., merged with AT & T Corp. to form AT & T Inc. Plaintiff now does business as AT & T Missouri.

plaintiff SBC's motion for summary judgment should be granted in part and denied in part, defendant Sprint Communications Company, L.P.'s motion for summary judgment should be granted, and defendant Charter FiberlinkMissouri, LLC's motion for summary judgment should be denied.

I.

Introduction and Regulatory Framework.

By enacting the Telecommunications Act of 1966 (the "Act"), "Congress entered what was primarily a state system of regulation of local telephone service and created a comprehensive scheme of telecommunications regulation administered by the Federal Communications Commission." *Indiana Bell Tel. Co. v. Indiana Utility Regulatory Comm'n*, 359 F.3d 493, 494 (7th Cir. 2004). While state utility commissions have a role in carrying out the Act, the Supreme Court of the United States has stated that the Act "unquestionably" took "regulation of local telecommunications competition away from the States." *AT & T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 378 n.6 (1999).

The Supreme Court has described the fundamental change effected by the Act in telephone markets as follows:

> Until the 1990's, local phone service was thought to be a natural monopoly. States typically granted an exclusive franchise in each local service area to a local exchange carrier (LEC),[2] which owned, among other things, the local loops

[2] "Local exchange carriers are companies that provide local telephone service." *Global NAPs, Inc. v. Verizon New England, Inc.*, 454 F.3d 91, 93 n.1 (2d Cir. 2006).

(wires connecting telephones to switches), the switches (equipment directing calls to their destinations), and the transport trunks (wires carrying calls between switches) that constitute a local exchange network. Technological advances, however, have made competition among multiple providers of local service seem possible, and Congress recently ended the longstanding regime of state-sanctioned monopolies.

The Telecommunications Act of 1996 . . . fundamentally restructures local telephone markets. States may no longer enforce laws that impede competition, and incumbent LECs are subject to a host of duties intended to facilitate market entry. Foremost among these duties is the LEC's obligation under 47 U.S.C. § 251(c) to share its network with competitors. Under this provision, a requesting carrier can obtain access to an incumbent's network in three ways: It can purchase local telephone services at wholesale rates for resale to end users; it can lease elements of the incumbent's network "on an unbundled basis"; and it can interconnect its own facilities with the incumbent's network. When an entrant seeks access through any of these routes, the incumbent can negotiate an agreement without regard to the duties it would otherwise have under § 251(b) or § 251(c). *See* § 252(a)(1). But if private negotiation fails, either party can petition the state commission that regulates local phone service to arbitrate open issues, which arbitration is subject to § 251 and the FCC regulations promulgated thereunder.

AT & T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 371-73 (1999) (footnote added).

"To facilitate the entry of competing carriers into the market for local [telephone] service, the Act requires that incumbent carriers provide 'interconnection' and other wholesale services to the competing carriers on a non-discriminatory basis." *Indiana Bell*, 359 F. 3d at 495. "Sections 251 and 252 of the Act lay out a process for reaching 'interconnection agreements' by which competing carriers can gain interconnection with the incumbent carrier's networks, facilities and services." *Id.*

Among the duties that apply to incumbent local exchange carriers ("ILECs")[3] is the obligation to lease certain parts of their networks to competitors at regulated rates. *See* 47 U. S.C. § 251(c)(3). Before a network facility is required to be made available under this provision, however, the Federal Communications Commission ("FCC") must determine that competitors are "impaired" without access to it. *Id.*, § 251(d)(2). A facility that the FCC has determined must be made available under this provision is known in the telecommunications industry as an "unbundled network element," or "UNE."[4]

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[3] ILECs are those dominant local exchange carrier companies that "were providing local phone service in an area on February 8, 1996, the date the Telecommunications Act became law." *Competitive Telecommc'ns Ass'n v. FCC*, 117 F.3d 1068, 1071 (8th Cir. 1997); *see* 47 U.S.C. § 251(h)(1). SBC is the ILEC in Missouri.

[4] The Act defines "network element" as "a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." 47 U.S.C. § 153(29). "The term 'unbundled'

UNE components include "loops," "switches," and "transport facilities." Loops are copper wires that connect a home or business to the local phone company switch. A switch is a device, usually software, that routes a call from a home or office to the intended recipient. Transport facilities are devices such as copper wires or fiberoptic cables that transport calls between switches. A UNE Platform is a combination of all the network elements required to provide local telephone service, required to be offered in a pre-packaged form that permits competing local exchange carriers ("CLECs") to provide telephone service with no actual switching, loop or transport facilities of their own. *See* Peter W. Huber, et al., *Federal Telecommunications Law* §2.7.4 at 123 (2d ed. Cum. Supp. 2004).

Rates that ILECs can charge for UNEs must be based on cost. 47 U.S.C. § 252(d)(1). The FCC has implemented this directive by a pricing methodology known as "total element long-run incremental cost," or TELRIC. *See Local Competition Order*,[5] 11 F.C.C.R. at 15,844, ¶ 672. TELRIC allows access to UNEs at very low rates, and has been upheld by the Supreme Court as the pricing methodology used under certain portions of the Act. *Verizon Commc'ns Inc. v. FCC*, 535 U.S. 467, 489 (2002).

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means that the incumbent LEC must 'give separate prices' for the competitor's use of each element instead of charging the competitor one price for the entire basket of network elements that it uses." Sprint's Mem. Supp. Mot. Summ. J. at 3, nn. 2-3 (internal punctuation omitted) (citing *AT & T Corp.*, 525 U.S. at 394).

[5] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15,499 (1996) ("*Local Competition Order*") (subsequent history omitted).

The duties of § 251 are implemented through "interconnection agreements" between ILECs and CLECs. *See* 47 U.S.C. § 252. The Act requires ILECs and CLECs to negotiate in good faith the terms and conditions of agreements to fulfill the duties described in §§ 251(b) and (c). *Id.*, § 251(c)(1). If negotiations are unsuccessful, either party may ask the appropriate state public utility commission to arbitrate "any open issues" the parties have been unable to resolve. *See id.*, § 252(b). In deciding these "open issues," the state commission must adhere to the requirements of the statute and the FCC's implementing regulations. *Id.*, § 252(c).

The Eleventh Circuit recently described the history of the FCC's efforts to implement a regulatory scheme under the Act, which ultimately resulted in the FCC's Triennial Review Remand Order ("TRRO").[6] Under the TRRO, the FCC no longer required unbundled access to certain network elements under § 251 and established a transition plan for the telecommunications industry to implement the new regulations:

> For eight years, the FCC tried and failed to implement a regulatory scheme that, after review by federal courts, satisfied the 1996 Act. For most of those eight years, the FCC required unbundling on the theory that it enhanced competition. The FCC required ILECs and CLECs to enter "voluntary" agreements to provide unbundled access to local telephone networks. If

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[6] Order on Remand, *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 F.C.C.R. 2533 (2005).

the parties could not agree, an agreement was provided either by the FCC or by state commerce commissions. States were given the authority to oversee voluntary agreements and arbitrate disputes arising from those agreements. 47 U.S.C. § 252(a), (b).

. . . .

In 2004, in a challenge to the FCC scheme filed by ILECs, the D.C. Circuit vacated the second attempt of the FCC to implement the directive of Congress regarding local phone service. *See U.S. Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004). The D.C. Circuit concluded, in part, that the unbundling regime enacted by the FCC was not based on a rational analysis of whether "CLECs are impaired in the mass market without unbundled access to ILEC switches." *Id.* at 569. The D.C. Circuit also expressed some frustration regarding the "failure [of the FCC], after eight years, to develop lawful unbundling rules, and its apparent unwillingness to adhere to prior judicial rulings." *Id.* at 595. In response to the ruling of the D.C. Circuit, the FCC issued interim rules that preserved the status quo ante while the FCC wrote new rules, and the FCC established a transition period, ending in early 2005, in which only existing customers could be served through UNEs.

In February 2005, the FCC released its Triennial Review Remand Order (TRRO), which stated that the unbundling of certain "UNE-Platform" (UNE-P) elements harmed competition by discouraging innovation. To redress that harm, the FCC stated that ILECs would no longer be obliged to provide CLECs "with unbundled

> access to mass market local switching," and the FCC provided more limited relief from unbundling for loops and transport. The FCC stated that existing, or "embedded," customers could continue to have access to UNE-Ps for up to twelve months, although at higher rates. The FCC also required CLECs to submit orders within one year to convert embedded UNE-P customers to "alternative arrangements." During the transition period, the FCC banned new orders for unbundled access to local mass market switching: "This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching." The FCC required both ILECs and CLECs to negotiate, under the change-of-law provisions in their contracts, any "necessary" changes to the interconnection agreements: "We expect that [carriers] will implement [our] findings . . . . Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order . . . . Thus, [carriers] must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes." Based on the "need for prompt action," the FCC stated that the TRRO was effective on March 11, 2005.

Bellsouth Commc'ns, Inc. v. MCIMetro Access Trans. Servs., LLC, 425 F.3d 964, 967 (11th Cir. 2005).

1. Section 271 Requirements.

In Section 271, the Act imposes a separate set of affirmative duties on the Bell Operating Companies ("BOCs") that were divested from AT & T in the consent decree entered in the anti-trust suit brought

in the 1970s by the U.S. Department of Justice. *See United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom Maryland v. United States*, 460 U.S. 1001 (1983) ("AT & T case"). These duties were imposed by Congress as a condition of removing the ban in the final judgment in the AT & T case which prohibited BOCs from providing long distance services. "Section 271 sets out the factors the FCC evaluates in deciding whether to grant the application of an [ILEC] carrier to enter the long-distance market." *Indiana Bell*, 359 F.3d at 495. "Part of the process is directed at ensuring that the applicant is facilitating competition in the market for local services before it is allowed to enter the long-distance market." *Id.*

Among the § 271 obligations is a list of fourteen competitive "checklist" items that BOCs must provide to CLECs to ensure that the market for local services is irreversibly open to competition. *See* 47 U.S.C. § 271(c)(2)(B).[7] The checklist items include: "Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services," *id.*, § 271(c)(2)(B)(iv); "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services," *id.*, § 271(c)(2)(B)(v); and "[l]ocal switching

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[7] "Section 271 of the Telecommunications Act appears in a section entitled 'Special Provisions Concerning Bell Operating Companies,' 47 U.S.C. §§ 271 to 276, which applies only to Bell Operating Companies (BOCs), all of which were formerly part of AT & T. Section 271 concerns the authority of BOCs to provide long distance services and provides, in general, that a BOC can only provide long distance services if it first meets certain requirements relating primarily to interconnection. 47 U.S.C. § 271(c)." *Bellsouth Telecommc'ns, Inc. v. Mississippi Public Serv. Comm'n*, 368 F.Supp.2d 557, 566 n.10 (S.D. Miss. 2005).

unbundled from transport, local loop transmission, or other services." *Id.*, § 271(c)(2)(B)(vi).

Under § 271, if BOCs such as SBC wish to offer long-distance service, they must provide CLECs with access to certain of their network elements even though they may no longer be required to provide those elements to the CLECs under § 251. Section 271 creates an obligation for BOCs to make network elements available to competitors which is independent of the ILECs' obligations under § 251. A key difference between the unbundling obligations of § 251 and the checklist obligations of § 271 is the price that CLECs must pay for the network elements: Under § 271, network elements are to be provided at a "just and reasonable rate," rather than at the low, cost-based TELRIC required by § 251. *See* Triennial Review Order ("TRO"), 18 F.C.C.R. at 17,389, ¶ 664.[8]

2. Role of State Public Utility Commissions.

The Act specifically delegates certain responsibilities to state public utility commissions such as the Missouri Public Service Commission ("MPSC"). The Act requires that "the participation of state commissions in the new federal regime be guided by federal-agency regulations." *Indiana Bell*, 359 F.3d at 494 (citing *AT & T Corp.*, 525 U.S. at 378 n.6). Relevant to this case, "state commissions have a role in helping to negotiate and arbitrate interconnection agreements if private negotiations fail to produce a complete agreement within a specific period of time." *Id.*; 47 U.S.C. § 252(a), (b). "Before any interconnection

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[8] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 F.C.C.R. 16,978 (2003) (subsequent history omitted) ("TRO").

agreement may be implemented, the state commission must approve it." *Id.*, § 252(e)(1). State commissions are also authorized to establish rates for interconnection, services or network elements for purposes of §§ 251(c)(2) and (3). *See* 47 U.S.C. §§ 252(c), (d).

In addition, § 271(d) requires the FCC to "consult" with state commissions to verify a BOC's compliance with § 271(c) competitive checklist items. *See* 47 U. S. C. § § 271(c) and (d). "The state commission makes a recommendation, which is merely advisory, as to whether the BOC has satisfied the requirements. The Act reserves to the FCC the authority to decide whether to grant a section 271 application." *Indiana Bell*, 359 F.3d at 495.

3. Factual and Procedural Background.

In 2001, plaintiff SBC, the incumbent Local Exchange Carrier ("ILEC") in Missouri, offered a standard interconnection agreement to its competitors. A number of the competitors entered into the standard agreements, which were approved by the MPSC pursuant to 47 U.S.C. § 252(e). The standard interconnection agreements were set to expire in March 2005. In late 2004 SBC attempted to negotiate new agreements with its competitors, but the parties were unable to reach complete agreement on all issues. As required by the Act, SBC petitioned the MPSC to arbitrate the agreements pursuant to § 252.

The arbitrator filed a Final Arbitrator's Report on June 21, 2005, consisting of some 2,075 pages. SBC and some of the CLECs filed comments and objections to the Final Arbitrator's Report on June 24, 2005. The MPSC heard oral arguments on the comments on June 29 and 30, 2005, and issued an

Arbitration Order (the "Arbitration Order") on July 11, 2005. The Arbitration Order adopted the Final Arbitrator's Report as the MPSC's decision on each unresolved issue, except to the extent the Arbitration Order specifically modified the Final Arbitrator's Report. On July 19, 2005, SBC sought rehearing of the Arbitration Order, asserting that it was contrary to federal law in certain respects. On August 3, 2005, as required by the Arbitration Order, SBC and the CLECs submitted interconnection agreements that conformed to the terms of the Arbitration Order. The MPSC approved these agreements, but in doing so did not address the issues raised by SBC in its rehearing petition.

SBC then filed this action, citing 47 U.S.C. § 252(e)(6), 28 U.S.C. § 1331, the Supremacy Clause of the United States Constitution, and 28 U.S.C. § 1367 as the bases for jurisdiction. The defendants are the MPSC, its individual members in their official capacities, and a number of competing local exchange carriers. SBC contends the Arbitration Order requires it to provide competitors with access to SBC's telecommunications network well beyond the access authorized by FCC regulations. SBC contends the Arbitration Order is preempted by applicable FCC regulations because the MPSC has ordered it to provide network elements in contravention of the FCC's binding regulations, and because the MPSC cannot require that terms and conditions for § 271 checklist items be included in SBC's interconnection agreements with CLECs.

SBC moved for a preliminary injunction to enjoin the Arbitration Order to the extent it authorizes CLECs to place new UNE Platform orders in violation of the "nationwide bar" on such new orders

contained in the FCC's TRRO. Rather than contesting SBC's motion, but without conceding its validity, the MPSC and the defendant CLECs stipulated to the entry of a preliminary injunction pending further orders of the Court. See Doc. 43.

VI.

Motion to Dismiss for Lack of Subject Matter Jurisdiction.

As a preliminary matter, the Court must address its jurisdiction to hear this matter. The MPSC moves to dismiss this case for lack of subject matter jurisdiction on the basis that it does not arise under the laws or Constitution of the United States as required for federal question jurisdiction under 28 U.S.C. § 1331. The MPSC contends that SBC's alleged statutory basis for jurisdiction, 47 U.S.C. § 252(e)(6), is not applicable in this case because § 252(e)(6) of the Act provides federal jurisdiction only where a state commission makes a determination under *that section*, and the Arbitration Order at issue here was not a determination under § 252 of the Act, but rather under §§ 271-72.

SBC responds that MPSC's position is directly contrary to the Supreme Court's holding in *Verizon Maryland, Inc. v. Public Service Commission*, 535 U.S. 635 (2002), which establishes that federal district courts have jurisdiction under 28 U.S.C. § 1331 over complaints such as SBC's, containing claims that a state commission violated the Act and FCC rulings. The MPSC did not file a reply memorandum.

The Court concludes that it has jurisdiction over this action. In *Verizon Maryland*, the Supreme Court held that 28 U.S.C. § 1331 gave the federal district court a basis for jurisdiction to review a claim that a

State commission violated federal law in determining that an interconnection agreement included calls placed to Internet Service Providers as local calls subject to a reciprocal arrangement. *Verizon Maryland*, 535 U.S. at 643-44. The Court declined to address whether 47 U.S.C. § 251(e)(6) gives federal courts power to review state commissions' interpretation of an interconnection agreement, but held that because the plaintiff's complaint alleged the state commission "violated the [Telecommunications] Act and [an] FCC ruling" and sought declaratory and injunctive relief against the state commission's decision, "federal courts have jurisdiction under § 1331 to entertain such a suit." *Id.* at 642. The Court explained that when a party seeks relief from a state commission order "on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail . . . its claim thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve." *Verizon Maryland*, 535 U.S. at 642 (internal quotation marks and citation omitted).

Subsequent Eighth Circuit decisions have held that under *Verizon Maryland*, federal district courts have subject matter jurisdiction "to determine whether a state administrative agency correctly interprets federal law, in this case the Telecommunications Act and the FCC regulations interpreting the Act." *Rural Iowa Indep. Tel. Ass'n v. Iowa Utilities Bd.*, 362 F.3d 1027, 1030 (8th Cir. 2004) (citing *Verizon Maryland*, 535 U.S. at 643-44); *see also Iowa Network Servs., Inc. v. Qwest Corp.*, 363 F.3d 683, 691-92 (8th Cir. 2004) (citing *Verizon Maryland* in support of the conclusion that jurisdiction exists under § 1331 to review state commission orders for compliance with

federal law). Because SBC alleges that the MPSC's decisions violate federal Law, *see* Complaint ¶¶ 43, 49-51, this Court has subject matter jurisdiction under 28 U.S.C. § 1331.

Motions to Strike.

The MPSC filed two motions to strike portions of pleadings as immaterial, one directed to SBC's complaint, and the other directed to the counterclaim/cross-claim filed by defendant Charter Fiberlink-Missouri, LLC ("Charter").

MPSC asserts that nineteen paragraphs in SBC's complaint and eighteen paragraphs in Charter's counterclaim/cross-claim violate the "simple, concise and direct" requirement of Rule 8(e)(1), Federal Rules of Civil Procedure, because these pleadings contains "several long and intricate legal arguments that are appropriately raised in a dispositive pleading or brief." Mots. to Strike, ¶ 2. MPSC cites no case law in support of its motions and does not provide any further information concerning the contents of the paragraphs at issue.

Under Federal Rule of Civil Procedure 12(f), a court may "order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Motions to strike are not favored and are infrequently granted, because they propose a drastic remedy. *Stanbury Law Firm v. Internal Revenue Service*, 221 F.3d 1059, 1063 (8th Cir. 2000). Nonetheless, resolution of such a motion lies within the broad discretion of the Court. *Id.* Matter will not be stricken unless it clearly can have no possible bearing on the subject matter of the litigation. 2 James W. Moore, et al., *Moore's Federal Practice* §12.37[3] (3rd ed. 2006). If there is any doubt

whether the matter may raise an issue, the motion should be denied. *Id.* If allegations are redundant or immaterial, they should be stricken only if prejudicial to the moving party. *Id.*

In this case, MPSC has not met its burden to establish that the challenged paragraphs have "no possible bearing" on the subject matter of the litigation. In addition, MPSC has not alleged, must less established, that any of the paragraphs it seeks to strike are prejudicial to it. MPSC's motions to strike should therefore be denied.

III.

SBC's Motion for Summary Judgment.

SBC's motion for summary judgment raises some but not all of the claims asserted in its complaint.[9]

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[9] Because this is an administrative appeal, the Court is sitting as an appellate tribunal reviewing the decision of an agency, rather than performing its traditional role as a trial level court. *Optimal Data Corp. v. United States*, 17 Cl. Ct. 723, 727 (1989). In an administrative appeal, the burden of proof is on the plaintiff to demonstrate that the administrative ruling is erroneous. *Ringsred v. Dole*, 828 F.2d 1300, 1302 (8th Cir. 1987). In an appeal where, as here, the issues are to be decided on briefs, SBC was required to make its case in its initial brief. *Disabled American Veterans v. Gober*, 234 F.3d 682, 688 (Fed. Cir. 2000) (in an administrative appeal, an issue not raised by the plaintiff in its opening brief is waived). To the extent SBC has not moved for summary judgment on other claims asserted in its complaint, those claims are abandoned and denied. *See GTE South Inc. v. Morrison*, 6 F.Supp.2d 517, 526 (E.D. Va. 1998) ("To secure summary judgment, a party must assert the grounds alleged in the complaint; otherwise, they are deemed abandoned."), *aff'd* 199 F.3d 733 (4th Cir. 1999); *see also MCI Telecommc'ns Corp. v. GTE Northwest, Inc.*, 41 F.Supp.2d 1157, 1186 (D. Or. 1999) (claims not briefed deemed abandoned). The applicable Case Management Order provided that SBC "will file

SBC asks the Court to vacate the MPSC's orders to the extent they require SBC to (1) provide access to unbundled switching and the UNE Platform pursuant to § 271 of the Act; (2) provide unbundled access to high-capacity loops and transport, dark fiber loops and sub-loops, and entrance facilities under § 271 of the Act, in circumstances where the FCC has held that these facilities need not be unbundled pursuant to § 251(c)(3) the Act; and (3) treat interexchange calls as subject to reciprocal compensation rather than access charges, where the calls originate in the "Internet Protocol" format. SBC asserts that the MPSC should be enjoined from imposing or enforcing these same obligations in any other agreements involving SBC.

SBC challenges the MPSC's Arbitration Order in two principal areas. First, SBC asserts that the Arbitration Order violates binding FCC decisions limiting the network facilities that state commissions can require incumbent carriers such as SBC to provide at regulated rates to their competitors. Simply put, SBC contends that the network-access requirements imposed by the MPSC have been deemed unlawful by the FCC. SBC also asserts that the MPSC purported to act pursuant to a statutory provision over which the FCC has exclusive authority, 47 U.S.C. § 271, and therefore exceeded its jurisdiction. The defendants responds that the MPSC

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a motion for summary judgment on all issues raised in its complaint . . . ."). *See* Doc. 83 at 2, ¶ 6. Moreover, SBC expressly agreed to present a motion for summary judgment "on all issues" raised in its complaint, and acknowledged, as did all parties, that denial of its motion for summary judgment would resolve its claim. *See* First Amended Joint Proposed Scheduling Order, ¶ 4 [Doc. 82].

acted within its jurisdiction under § 271 to include the network-access requirements challenged by SBC.

Second, SBC asserts that the MPSC erred in determining the compensation that applies when SBC and its competitors exchange traffic that a competitor has converted from an Internet Protocol format to standard analog format. SBC contends the MPSC's analysis on this issue is directly contrary to federal law and is completely unreasoned, as the MPSC offered no substantive rationale in support of its decision. The defendants respond that the MPSC correctly determined that reciprocal compensation applies to such calls rather than higher-fee access charges, and adequately explained its reasoning.

1. Standard of Review.

In actions such as this one, federal district courts apply *de novo* review to state commissions' interpretation and application of federal law, and apply a deferential "arbitrary and capricious" review standard to the commissions' factual determinations and mixed questions of law and fact. *See WWC License, L.L.C. v. Boyle*, No. 05-1725, 2006 WL 2419162, *6 , __ F.3d __ (8th Cir. Aug. 23, 2006) (citing cases). SBC's challenges to the MPSC's actions primarily allege that the MPSC misinterpreted or misapplied federal law, and therefore are subject to *de novo* review.

2. Discussion.

A. MPSC Jurisdiction Over § 271 Elements.

In the Arbitration Order, the MPSC recognized that under binding FCC regulations, ILECs such as SBC are no longer required under § 251 to offer CLECs unbundled access to local switching, high-

capacity loops, dedicated transport, OCn and dark fiber loops, and dark fiber and feeder subloops.[10] Nonetheless, the MPSC required SBC to provide CLECs with unbundled access to certain of these network elements under § 271. The Arbitration Order recognized that while unbundled access to these UNEs was proper at TELRIC rates under § 251, access to the same UNEs under § 271 is proper only at the "just and reasonable" rate standard established under §§ 201 and 202 of the Act. The MPSC concluded that it had authority to enforce the FCC's "just and reasonable" pricing standard for § 271 UNEs, and adopted rates patterned on the FCC's transition period rates for declassified § 251 UNEs, on an interim basis. *See* Arbitration Order at 28-30.

The gravamen of SBC's complaint is that the MPSC erroneously concluded it had the jurisdiction and authority to order § 271 unbundling obligations to be included in an interconnection agreement arbitrated pursuant to § 252, where SBC had not agreed to negotiate access to these facilities pursuant to § 251. SBC contends that the statute gives jurisdiction over enforcement of § 271 exclusively to the FCC. SBC also contends that the Arbitration Order requires it to provide CLECs with the UNE Platform in direct contravention of the FCC's ruling in the TRRO, and therefore creates a substantive conflict

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[10] "Dark fiber consists of unused fiber within an existing fiber optic cable that has not been activated through optronics to make it capable of carrying communications services. Users of unbundled dark fiber loops furnish their own electronic equipment to activate the dark fiber strands to provide voice and data services." *Verizon New England Inc v. Maine Public Util. Comm'n*, No. 05-53-B-C, 2006 WL 2007655, *3 n.8 (D. Me. July 18. 2006).

with federal law and is preempted. Finally, SBC asserts that even if the MPSC had jurisdiction to issue the rulings concerning UNEs, it did not have the authority to set regulated rates, as "just and reasonable" rates contemplate a market price arrived at through negotiations between SBC and the CLECs.

The MPSC and the Coalition defendants[11] separately respond that the MPSC properly exercised its duties under §§ 271 and 272 of the Act and correctly ordered SBC's interconnection agreements with CLECs to include terms and conditions for the § 271 checklist items SBC is required to make available to its competitors—local switching, local loops and local transport. The Coalition defendants contend that SBC's obligation to make portions of its network available to CLECs on an unbundled basis exists under two distinct sections of the Act, § 251 and § 271, and note that § 271 explicitly requires the § 271 checklist items to be included in § 252 interconnection agreements. The Coalition defendants contend that approval of terms and conditions for § 271 checklist elements does not constitute "enforcement" of SBC's § 271 elements by the MPSC, and that the MPSC's Arbitration Order is therefore not preempted by the FCC's regulatory scheme.

As stated in the introductory section of this opinion, the Act completely changed the primarily state

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[11] The Coalition defendants are defendants Big River Telephone Company, LLC, Nuvox Communications of Missouri, Inc., Socket Telecom, LLC, XO Communications Services, Inc., Xspedius Management Co. of Kansas City, LLC, and Xspedius Management Co. Switched Services, LLC. Separately, defendant WilTel Local Network, LLC joined in the Coalition defendants' opposition memorandum. *See* Doc. 100.

system of regulation of local telephone service and created a comprehensive, federally-administered scheme of telecommunications regulation. *See Indiana Bell*, 359 F.3d at 494. The Act took "regulation of local telecommunications competition away from the States," *AT & T Corp.*, 525 U. S. at 378 n.6, as "Congress transferred broad authority from state regulators to federal regulators, even while it left corners in which the states had a role." *Indiana Bell*, 359 F.3d at 497. "The new regime for regulating competition [under the Act] is federal in nature . . . and while Congress has chosen to retain a significant role for state commissions, the scope of that role is measured by federal, not state, law." *Southwestern Bell Tel. Co. v. Connect Commc'ns Corp.*, 225 F.3d 942, 947 (8th Cir. 2000).

The issue here is whether the MPSC's action is permissible under the Act, or whether the MPSC has overstepped its prescribed role. For the following reasons, the Court concludes that the MPSC's actions were without jurisdiction and are preempted by the Act.

The text of § 271 gives the FCC exclusive jurisdiction over the enforcement of that section. Section 271 provides that BOC applications to provide long-distance services are submitted to the FCC, which has sole authority to grant the applications. *See* §§ 271(b)(1), (d)(1), (d)(3). The only role Congress delegated to state commissions under § 271 is to act as consultant to the FCC during the application process. *See* § 271(d)(2)(B). Where a BOC has already received approval to provide long-distance services, the statute places exclusive enforcement of any ongoing obligations with the FCC. *Id.*, § 271(d)(6). If the FCC determines that a BOC is no longer

meeting § 271's requirements, it may order the BOC to correct any deficiencies, impose a penalty, or suspend or revoke the BOC's § 271 approval. 47 U.S.C. § 271(d)(6)(A).

Section 271 does not contain an express provision for rate-making or rate-making authority, but provides that a BOC must provide the competitive checklist items of § 271(c)(2)(B) at "just and reasonable rates." In contrast, § 252 explicitly authorizes state commissions to set "just and reasonable" rates for interconnection and network element charges under §§ 251(c)(2) and (3). Section 252 provides that the state commission's duty in arbitrating and approving agreements is limited to ensuring that the agreement "meets the requirements of section 251," and does not mention any role for the state commission under § 271. *See* 47 U.S.C. §§ 252(c)(1), (3)(2)(B).

In a different context than presented by this case, the FCC has recognized that Congress granted "sole authority to the [FCC] to administer . . . section 271." *InterLATA Boundary Order*, 14 F.C.C.R. at 14,400-01, ¶¶ 17-18.[12] Two federal district courts have commented, also in a different context, that enforcement authority for § 271 unbundling duties lies with the FCC and must be challenged there first, and that federal courts are not the appropriate forum to address such issues in the first instance. *See BellSouth Telecommc'ns, Inc. v. Mississippi Public Serv. Comm'n*, 368 F.Supp.2d 557, 565 (S.D. Miss. 2005);

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[12] *In the Matter of Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding U.S. West Petitions to Consolidate LATAs in Minnesota and Arizona*, 14 F.C.C.R. 14,392 (1999) ("*InterLATA Boundary Order*").

BellSouth Telecommc'ns, Inc. v. Cinergy Commc'ns Co., 2006 WL 695424, No. 03:05-CV-16-JMH, slip op. at 12 (E.D. Ky. 2005).

A third federal district court recently concluded that the New Hampshire public utilities commission lacked the authority to set rates for § 271 UNE elements, and that the commission's use of TELRIC rates for these elements directly conflicted with the FCC's rulings. *See Verizon New England, Inc. v. New Hampshire Public Util. Comm'n*, No. 05-CV-94-PB, slip op. at 24-29 & n.33 (D.N.H. Aug. 22, 2006). Unlike the MPSC in the present case, the New Hampshire state commission did not argue that federal law authorized it to set § 271 rates. Rather, it contended that Verizon agreed to submit its § 271 rates to the commission. *Id.* at 25-26. The court rejected this factual contention and concluded that the commission had exceeded its jurisdiction in setting rates under § 271. Id. at 26-29. *But see Verizon New England, Inc. v. Maine Public Utilities Comm'n*, 403 F.Supp.2d 96, 102-03 (D. Me. 2005) (holding that Maine law authorized the state commission to require ILEC to offer network elements under § 271 and to set the prices of such offerings).

Although the decisions of state public utility commissions are not unanimous, numerous state commissions have concluded that they lack jurisdiction or authority to include § 271 checklist items or to order § 271 unbundling as part of arbitrated interconnection agreements, or to set rates for these items. *See* SBC Reply, Ex. 2 [Doc. 103].

The MPSC and the CLEC defendants rely on § 271(c)(1) and (c)(2) as providing authority for the MPSC's inclusion of § 271 elements and rate-setting for these elements in the interconnection agreements.

Subsections (c)(1) and (c)(2) provide that to obtain initial § 271 approval, a BOC must show that it is providing the relevant services under "one or more binding agreements that have been approved under section 252." 47 U.S.C. § 271(c)(1)(A). The CLEC defendants' argument is based on the Act's requirements that: (1) terms and conditions for § 271 checklist items must be contained in an approved interconnection agreement, (2) such interconnection agreements must be approved under § 252, and (3) § 252 approval is granted exclusively by state commissions as part of the statutory negotiation and arbitration process. The CLECs therefore argue that "[i]nclusion of the 'approved under section 252' language means that the agreements incorporating § 271 checklist elements are subject to the § 252 state commission arbitration process if the parties do not reach agreement, as well as subject to state commission review and approval if negotiated by the parties." CLEC Defs.' Mem. Opp. to SBC's Mot. for Summ. J. at 13.

Section 271(c)(1) does not, however, provide authority to state commissions to arbitrate disputed terms or to set rates during an arbitration. Instead, the statute limits state commission arbitration and rate-setting authority to items required under § 251. SBC argues persuasively that it could satisfy the requirements of § 271(c)(1)(A) by pointing to a single, voluntarily negotiated agreement, approved by a state commission, pursuant to which SBC would make available the items on the competitive checklist, including switching, at a just and reasonable rate. Therefore, the limited statutory reference to state commission approval under § 252 cannot vest authority in the MPSC to set the rates for all § 271

checklist items, and is not properly understood as an implied grant of arbitration or rate-making authority.

For these reasons, the Court concludes that the MPSC lacks the jurisdiction and authority to order § 271 unbundling obligations to be included as part of an interconnection agreement arbitration pursuant to § 252, where SBC has not agreed to negotiate access to these facilities pursuant to § 251. The Court declines to follow *Verizon New England, Inc. v. Maine Public Utilities Comm'n*, which concluded that state commissions have the authority to require § 271 elements in interconnection agreements and to set rates under § 271. *See* 453 F. Supp.2d at 102. The decision cites no federal-law grant of authority to support its conclusion, but rather implies it from § 271's silence with respect to rate-making authority and relies on Maine law as a source of authority. This reasoning is contrary to the FCC's rulings and the decisions of most state commissions, and fails to adequately acknowledge the Act's transfer of the regulation of local telecommunications competition from the states to the FCC. *AT & T Corp.*, 525 U.S. at 378 n.6. Under the current regulatory scheme, "while Congress has chosen to retain a significant role for state commissions, the scope of that role is measured by federal, not state, law." *Southwestern Bell*, 225 F.3d at 947.

The Court concludes that the Arbitration Order's requirement that SBC include § 271 unbundling obligations in its interconnection agreements is beyond the jurisdiction of the MPSC. This aspect of SBC's motion for summary judgment should therefore be granted.

B. Unbundled Switching and UNE Platform.

Separate from the issue of the MPSC's jurisdiction to impose obligations on SBC under § 271, SBC argues that the substantive obligations imposed in the Arbitration Order contravene the clear intent of the FCC as expressed in the TRRO, and are therefore preempted. Specifically, SBC contends that the MPSC's requirement that it combine switching, which is only required under § 271, with facilities required under § 251 creates the same substantive combination as the UNE Platform and is directly contrary to the FCC's holding. The Court agrees.

As stated in the introduction of this opinion, the FCC in its 2005 Triennial Review Remand Order ("TRRO") prohibited the mandatory leasing of unbundled switching, which is necessary for the UNE Platform, at TELRIC rates. The FCC explained that competitors were not impaired without unbundled switching and further determined that the availability of the UNE Platform hindered genuine competition. TRRO, 20 F.C.C.R. at 2653, ¶¶ 218, 220. The FCC adopted a "nationwide bar" on the mandatory unbundling of local switching. *Id.* at 2644, ¶ 204. Because of the "need for prompt action," the FCC made its new rules effective on March 11, 2005. *Id.* at 2666, ¶ 235.

The FCC also created a twelve-month transition period, beginning on that same effective date, during which CLECs could continue to use unbundled mass market switching, and thus the UNE Platform, but only to serve existing mass market customer lines. *See id.* at 2659-61, ¶¶ 226-28. CLECs were not permitted to place new orders for unbundled switching and the UNE Platform as of the TRRO's March 11, 2005 effective date. *Id.* at 2641, ¶ 199. During the

twelve-month transition period, ILECs were to receive an additional dollar per line per month over prior UNE Platform rates. *Id.* at 2660, ¶ 228 n.630. These transition rules and the transition rate applied "only to the embedded [*i.e.*, existing] customer base" and did "not permit competitive LECs to add new UNE Platform arrangements using unbundled access to local circuit switching pursuant to section 251(c)(3)." TRRO at 2659-60, ¶ 227.

The FCC also held that facilities which are required only under § 271, unlike UNEs required under § 251, need not be provided in combined, prepackaged form. *See* Triennial Review Order,[13] 18 F.C.C.R. at 17,386, ¶ 655 n.1990 ("We decline to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251."), *vacated in part and remanded in part by United States Telecom Ass'n v. FCC*, 359 F.3d 554, 589-90 (D.C. Cir.) (*"USTA II"*) (affirming FCC's finding that the no-combination ruling was an "important respect[]" in which § 251 and § 271 differ), *cert. denied*, 543 U.S. 945 (2004).

The Arbitration Order permits CLECs to use the same combination of facilities which comprise the UNE Platform, without limitation and at the same transitional rates the FCC held should apply only to the embedded customer base. *See* Arbitration Order at 28-30. The Arbitration Order therefore conflicts with substantive restrictions the FCC has placed on UNE access, and accordingly is preempted. *See* 47 U.S.C. §§ 251(d)(3), 261(b)-(c) (precluding state com-

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[13] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 F.C.C.R. 16978 (2003) (subsequent history omitted) ("TRO").

mission actions that are not "consistent" with federal law).

The analysis does not change because the MPSC purported to act pursuant to § 271 rather than § 251. The FCC has held that if a state commission decision in substance reimposes an unbundling decision that the FCC found improper under § 251, that decision is preempted regardless of whether the commission purports to be imposing a § 251 obligation. *See* Memorandum Opinion & Order, *BellSouth Telecommc'ns, Inc. Request for Declaratory Ruling*, 20 F.C.C.R. 6830, ¶¶ 25-26 (2005) (state commission's decision to require unbundled access to a network element that the FCC expressly declined to unbundle directly conflicted with and was inconsistent with the FCC's rules and policies implementing § 251 and was preempted).

Therefore, the Court concludes that the Arbitration Order conflicts with and is preempted by federal law to the extent it requires SBC to provide unbundled access to switching and the UNE Platform.

C. Unbundled Access to Other Network Facilities.

The Arbitration Order requires that SBC provide CLECs with unbundled access to other network facilities—high capacity loops, dedicated transport, OCn and dark fiber loops, and dark fiber and feeder subloops—in circumstances where the FCC has said these facilities may not be required pursuant to § 251. As with unbundled switching discussed above, the MPSC ordered access to these facilities pursuant to § 271 of the Act. *See* Final Arbitrator's Report § I(A) at 1-3, 87-90; § III at 33, 47-48, 59; *id.* at 44 (loops); *id.* at 55 (dark fiber transport, dark fiber loops); *id.* at 68-69 (subloops).

SBC asserts that these aspects of the MPSC's Arbitration Order exceed the MPSC's jurisdiction and conflict with binding FCC rules for the reasons discussed above in connection with unbundled switching. The Court agrees. The MPSC lacks jurisdiction or authority to include § 271 checklist items or to order § 271 unbundling as part of arbitrated interconnection agreements, or to set rates for these items. In addition, the MPSC's decision to require unbundled access to these facilities, in circumstances where the FCC has said they may not be unbundled under § 251, creates a substantive conflict with federal law and is accordingly preempted.

SBC's motion for summary judgment should also be granted on the issue of unbundled access to other network facilities no longer required under § 251, on the basis that the MPSC lacked jurisdiction to require the inclusion of these elements in SBC's interconnection agreements, and the Arbitration Order is contrary to federal law.

D. Access to Entrance Facilities Under Section 251(c)(2).

SBC asserts that the Arbitration Order also contravenes the FCC's rulings in the TRRO by requiring SBC to provide CLECs with entrance facilities at TELRIC rates, although CLECs are no longer impaired with respect to entrance facilities and therefore are not entitled to these facilities as UNEs under § 251(c)(3). Defendant Sprint contends in its cross-motion for summary judgment that the MPSC correctly ruled that CLECs are entitled to entrance facilities as needed for interconnection pursuant to § 251(c)(2), and that TELRIC is the appropriate rate for these facilities. The Court agrees with Sprint's position.

An entrance facility is a transmission facility that connects CLEC networks with ILEC networks. *See* TRRO, 20 F.C.C.R. at 2609, ¶ 136. In the TRRO, the FCC held that CLECs are not impaired without access to entrance facilities, and therefore CLECs are not entitled to entrance facilities as unbundled network elements (UNEs) under § 251(c)(3). *See* 20 F.C.C.R. at 2609-12, ¶¶ 136-41. The TRRO is clear, however, that the FCC's "finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to § 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service." *Id.* at 2611, ¶ 140. "Thus, competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network." *Id.*

In the Arbitration Order, the MPSC acknowledged the FCC's ruling that CLECs are not entitled to entrance facilities as UNEs, but required SBC to allow access to these same facilities pursuant to 47 U.S.C. § 251(c)(2), which requires ILECs to provide "interconnection" to CLECs. *See* Final Arbitrator's Report, § IV at 16, 31-35; § V at 16. The Court concludes that the MPSC's Arbitration Order correctly implements the FCC's rulings on this issue as set forth in the TRRO and the TRO. *See* TRRO, 20 F.C.C.R. at 2611, ¶ 140; TRO, 18 F.C.C.R. at 17,202-04, ¶¶ 365-66.

In the context of ILEC-CLEC network arrangements, carriers can use entrance (transmission) facilities for at least two distinct purposes: (1) to provide a final link in the dedicated transmission path between a CLEC's customer and the CLEC's

switch, and (2) as interconnection facilities to exchange traffic between ILEC and CLEC switches. In the first situation, a CLEC does not use entrance facilities for interconnection purposes, but rather to carry traffic to and from its own end users, a process known as "backhauling." In the second situation, a CLEC uses entrance facilities to interconnect with the ILEC's network, to provide a transmission path between the ILEC's switch and the CLEC's switch for the exchange of traffic between the two networks. *See* TRO, 18 F.C.C.R. at 17202-03, ¶¶ 365-66; *see also* Ex. 9 to Sprint's Mem. Supp. of Cross-Mot. for Summ. J. (schematic drawing).

The FCC determined that when a CLEC uses entrance facilities to carry traffic to and from its own end users (situation (1) above), the CLEC is not entitled to obtain entrance facilities from ILECs as § 251(c)(3) UNEs. *See* TRRO, 20 F.C.C.R. at 2610-12, ¶¶ 136-41. The FCC reaffirmed its earlier determination, however, that if a CLEC needs entrance facilities to interconnect with an ILEC's network (situation (2) above), the CLEC has the right to obtain such facilities from the ILEC, at cost-based rates, under § 251(c)(2) of the Act. *Id.* at 2611, ¶ 140; TRO, 18 F.C.C.R. at 17,202-04, ¶¶ 365- 66.

The Court rejects SBC's contention that the TRRO only requires an ILEC to allow CLECs to interconnect with its network and does not require that it lease the interconnection facilities themselves to CLECs. The FCC has interpreted "interconnection" to mean "the physical linking of two networks for the mutual exchange of traffic." *Local Competition Order*, 11 F.C.C.R. at 15,590, ¶ 176. In implementing this requirement, the FCC has held that CLECs have a "right . . . to obtain *interconnection facilities* pursuant to section 251(c)(2) . . . at cost-based rates . . . ."

TRRO, 20 F.C.C.R. at 2611, ¶ 140 (emphasis added). The term "interconnect" refers to "'facilities and equipment,' not to the provision of any service." *AT & T Corp. v. FCC*, 317 F.3d 227, 234-35 (D.C. Cir. 2003) (interpreting the term "interconnect" in § 251(a)(1)); *see Competitive Telecommc'ns Ass'n v. FCC*, 117 F.3d 1068, 1071 (8th Cir. 1997) (stating of § 251(c)(2), "By its own terms, this reference is to a physical link between the equipment of the carrier seeking interconnection and the LEC's network."). Based on the foregoing, the Court concludes that SBC is required under the Act and FCC regulations to provide access to entrance facilities necessary for interconnection.

The MPSC made a factual determination that the SBC entrance (transmission) facilities provided under its agreement with Sprint would be used solely for interconnection purposes within the meaning of § 251(c)(2). *See* Final Arbitrator's Report, § IV, at 33-35; *id.* § V, at 15-16. This factual determination was supported by the record evidence. *See* Direct Testimony of Don Price at 13 5-3 6 (Sprint Ex. 7); Rebuttal Testimony of Peter Sywenki at 8-11 (Sprint Ex. 4); Direct Testimony of Edward J. Cadieux at 73-75 (Sprint Ex. 5); Rebuttal Testimony of Edward J. Cadieux at 28-29 (Sprint Ex. 6). Accordingly, the MPSC's factual determination is not arbitrary or capricious and should be affirmed.

The Arbitration Order requires SBC to allow access to entrance facilities at the same cost-based TELRIC rates that apply to UNEs, when the entrance facilities are used for interconnection purposes under § 251(c)(2). *See* Final Arbitrator's Report, § IV at 16, 31-35; § V at 16. Although SBC challenges use of the TELRIC rate, the Court concludes the Arbitration Order's requirement correctly implements the FCC's rulings.

The FCC stated in the TRRO that the Act mandates cost-based rates for network interconnection. *See* TRRO, 20 F.C.C.R. at 2611, ¶ 140. Section 251(c)(2)(D) requires ILECs to provide interconnection facilities on the "rates, terms and condition" that comply with the requirements of § 252. 47 U.S.C. § 251(c)(2)(D). Section 252(d)(1), in turn, provides that "the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251" shall be cost-based. *Id.*, § 252(d)(1)(A)(i). In implementing this rate provision, the FCC established the TELRIC methodology. *See Local Competition Order*, 11 F.C.C.R. at 15,844, ¶ 672; *see also* 47 C.F.R. §§ 51.501(a)-.505 (2005) (applying TELRIC to the pricing of interconnection). The FCC concluded that Congress intended to apply the same pricing rules to interconnection and UNEs, based on the plain language of §§ 251(c)(2), (c)(3), and § 252(d)(1). *See Local Competition Order*, 11 F.C.C.R. at 15, 816, ¶ 628. The Arbitration Order correctly adhered to the FCC's mandate when it directed the use of TELRIC rates for entrance facilities provided by SBC under the Sprint Agreement for use as interconnection facilities.

For these reasons, the Arbitration Order should be affirmed to the extent it determined that CLECs are entitled to entrance facilities as needed for interconnection pursuant to § 251(c)(2), and that TELRIC is the appropriate rate for these facilities. SBC's motion for summary judgment should therefore be denied with respect to the entrance facilities issue and Sprint's cross-motion for summary judgment should be granted.

E. Compensation for IP-PSTN Traffic.

The final issue in SBC's motion for summary judgment challenges the MPSC's determination that SBC and the CLECs should exchange reciprocal compensation for Internet Protocol ("IP") to public switched telephone network ("PSTN") traffic, instead of higher switched access charges for this traffic. SBC contends that reciprocal compensation for IP-PSTN traffic is contrary to the Act and the FCC's rules. SBC also contends that this aspect of the Arbitration Order is arbitrary and capricious and results from a failure to engage in reasoned decision-making.[14]

The defendants respond that the MPSC's determination is consistent with the Act and the FCC's current intercarrier compensation rules, and should be affirmed. The defendants assert that all IP-PSTN traffic is eligible for reciprocal compensation under the Act, and is exempt from access charges under longstanding FCC precedent which insulates providers of "enhanced services" from the access charges that would apply to carriers providing basic long distance service. The Court agrees with the defendants.

Background.

1. Reciprocal Compensation.

Section 251(b)(5) of the Act imposes upon LECs the "duty to establish reciprocal compensation arrangements for the transport and termination of tele-

[14] In the proceedings before the MPSC, SBC argued that access charges should apply to all IP to PSTN traffic. In the case before the Court, SBC limits its argument, asserting that access charges should apply only to "interexchange" IP to PSTN traffic. This difference is immaterial, because the Court concludes that all IP-PSTN traffic is eligible for reciprocal compensation under the Act.

communications." 47 U.S. C. § 251(b)(5); *Ace Tel. Ass'n v. Koppendrayer*, 432 F.3d 876, 881 (8th Cir. 2005). "Reciprocal compensation is payment from the carrier who originates a call to the carrier who terminates or receives a call. Reciprocal compensation is intended to permit the carrier for the customer who receives a call to recoup from the caller's carrier those expenses incurred for terminating the call or sending it to its final destination." *WWC License, L.L.C. v. Boyle*, No. 05-1725, 2006 WL 2419162, *2 , __ F.3d __ (8th Cir. Aug. 23, 2006) (citing *Ace Tel.*, 432 F.3d at 878, and 47 U.S.C. § 252(d)(2)(A)(i) (stating that reciprocal compensation must "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier.")).

The FCC's definition of the scope of reciprocal compensation has changed over time. In 1996, the FCC initially limited the application of reciprocal compensation to the exchange of "local" traffic, *Local Competition Order*, ¶¶ 1033-1034, 1040, and defined "local" traffic for reciprocal compensation purposes as traffic that "originates and terminates" in the same local calling area. 47 C.F.R. § 51.701(b)(1) (1996), *vacated, Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

In 2001, the FCC examined whether reciprocal compensation should apply to traffic directed to Internet Service Providers ("ISP traffic"). In connection with that particular inquiry, it abandoned the prior focus on whether traffic was "local." *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Com-*

pensation for ISP-Bound Traffic, 16 F.C.C.R. 9151, ¶¶ 8, 30, 36 n.64, 39, 42 (2001) ("*ISP Remand Order*"). Instead, the FCC determined that reciprocal compensation should apply to all traffic that is not encompassed by § 251(g) of the Act, which preserved pre-Act rules for "exchange access, information access, and exchange services for such access." 47 U.S.C. § 251(g).

The *ISP Remand Order* was appealed to the D.C. Circuit, which reversed the FCC's interpretation of § 251(g). *WorldCom, Inc. v. FCC*, 288 F.3d 429, 433-34 (D.C. Cir. 2002). The Court concluded that "[o]n its face, § 251(g) appears to provide simply for the 'continued enforcement' of certain pre-Act regulatory 'interconnection restrictions and obligations.'" *Id.* at 432. The Court stated that while § 251(g) preserves pre-Act obligations under a "regulation, order, or policy of the Commission," it does not authorize the FCC to "override virtually any provision of the 1996 Act so long as the rule it adopted were in some way, however remote, linked to LECs' pre-Act obligations." *Id.* at 433. Section 251(g) did not empower the FCC to exempt ISP-bound traffic from reciprocal compensation because "there had been *no* pre-Act obligation relating to intercarrier compensation for ISP-bound traffic." *Id.* Although the D.C. Circuit found no basis for the FCC's action, it chose not to "make . . . further determinations" regarding the validity of the *ISP Remand Order* and left the Order in place and remanded it to the FCC for further proceedings consistent with the Court's decision. *Id.* at 434. To date, the FCC has not yet issued another comprehensive order governing intercarrier compensation for ISP traffic.

2. Access Charges.

Access charges are part of an intercarrier compensation regime established in the 1980s to govern long distance calls. *See Iowa Network Servs. Inc.*, 363 F.3d at 686; *Bell Atlantic Tel. Cos.*, 206 F.3d at 7-8. "Exchange access" means "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." 47 U.S.C. § 153(16). "Telephone toll service" is defined as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service." *Id.* § 153(48). Access charges historically have included "significant implicit subsidies" and by definition have been well above cost. *See In re Access Charge Reform*, 12 F.C.C.R. 15,982, ¶¶ 39-40 (1997) ("*Access Charge Reform Order*"); *Competitive Telecommc'ns Ass'n v. FCC*, 309 F.3d 8, 14-15 (D.C. Cir. 2002) (describing "implicit subsidies" for universal service that remain "embedded in access charges."). As a result, an incumbent carrier that collects access charges for terminating traffic receives more money than it would if it exchanged reciprocal compensation for the same traffic.

3. Enhanced Services and Information Services.

In 1980, the FCC distinguished between "basic service," *i.e.*, regular telephone service, and "enhanced service," *i.e.*, computer-processing service offered over telephone lines. *See National Cable & Telecommc'ns Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 125 S. Ct. 2688, 2696 (2005). A basic service was a "transparent transmission . . . that enabled the consumer to transmit an ordinary-language message to another point, with no computer processing or

storage of the information . . . ." *Id.* at 2697; *see also In re Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.R. 384, ¶¶ 94-96 (1980) ("*Computer II Order*"). In contrast, an "enhanced service" was defined as "service in which computer processing applications [were] used to act on the content, code, protocol, and other aspects of the subscriber's information, such as voice and data storage services, as well as protocol conversion (*i.e.*, ability to communicate between networks that employ different data-transmission formats)." *Brand X Internet Servs.*, 125 S. Ct. at 2697 (alteration in original; internal citation omitted); *see also Computer II Order*, ¶¶ 97, 99.

Prior to the Act, telecommunications traffic was regulated based on the distinction between "basic" and "enhanced" services. Basic services were heavily regulated, *Brand X Internet Servs.*, 125 S. Ct. at 2697, and could be subject to compensation rules such as the access charge regime. Enhanced services generally were outside the scope of common-carrier regulation. *Id.* "The Commission explained that it was unwise to subject enhanced service to common-carrier regulation given the fast-moving, competitive market in which they were offered." *Id.*

In 1988, the FCC excluded providers of enhanced services from the obligation to pay access charges imposed on interexchange carriers exchanging long distance traffic. *In re Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 F.C.C.R. 2631, ¶ 17 (1988) ("*ESP Exemption Order*"). The FCC did not directly exempt enhanced service providers ("ESPs") from interstate access charges, but rather defined ESPs as "end users." *See ACS of Anchorage, Inc. v. FCC*, 290 F.3d

403, 409 (D.C. Cir. 2002). As end users, ESPs obtain access to other carriers' networks by purchasing a local business line (and paying tariffed rates for use of those lines). *Id.* at 409. The FCC recognized that ISP-bound traffic was interstate access, but treated such traffic as though it were local. *BellSouth Telecommc'ns, Inc. v. ITC Deltacom Commc'ns, Inc.*, 62 F. Supp.2d 1302, 1313 (M.D. Ala. 1999). Although the exemption for ESPs was described as a temporary means to avoid "unduly" burdening the developing IP industry, *ESP Exemption Order*, ¶ 2, it remains in effect. *See In re Developing a Unified Intercarrier Compensation Regime*, 20 F.C.C.R. 4685, ¶ 1 n.2 (2005) (noting continued existence of ESP exemption); *In re Amendments of Part 6 of the Commission's Rules Relating to the Creation of Access Charge Supplements for Open Network Architecture Policy and Rules Concerning Rates for Dominant Carriers*, 6 F.C.C.R. 4524, ¶ 60 (1991) (retaining exemption for policy reasons); *BellSouth Telecommc'ns, Inc.*, 62 F.Supp.2d at 1313 (noting FCC's continued maintenance of ESP exemption).

The Act defines two classes of telecommunications traffic—"information service" and "telecommunications service"—which are analogous to the pre-Act distinction between enhanced and basic services. 47 U.S.C. §§ 153(20), 153(46); *see Brand X Internet Servs.*, 125 S. Ct. at 2697. A "telecommunications service" is "the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used." 47 U. S.C. § 153(46). The Act defines an "information service" as the offering of a capability "for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunications*." *Id.*, § 153(20) (emphasis added). "Telecommunications" is defined

as the "*transmission*, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.*, § 153(43) (emphasis added).

4. VoIP Telecommunications.

Voice Over Internet Protocol ("VoIP") technologies enable real-time delivery of voice and voice-based applications. *Petition for Declaratory Ruling that AT & T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, 2004 WL 856557, 19 F.C.C.R. 7457, at ¶ 3 (Order April 21, 2004) ("*AT & T Access Charge Order*"). "When VoIP is used, a communication traverses at least a portion of its path in an IP packet format using IP technology and IP networks." *Southwestern Bell Tel., L.P. v. VarTec Telecom, Inc.*, 2005 WL 2033416, *2 (E.D. Mo. Aug. 23, 2005) (citing *AT & T Access Charge Order*). "VoIP can be transmitted over the public Internet or over private IP networks, using a variety of media." *Id.*

VoIP "had not emerged from the labs in any meaningful way" at the time the Act was enacted. Remarks of Michael K. Powell, then-Chairman, Federal Communications Commission, at 1, Oct. 19, 2004 (Ex. B. to MCI Communications Services, Inc.'s Mem. in Opp. to SBC Mot. for Summ. J.). The FCC has not yet issued regulations exclusively addressing the classification and treatment of VoIP traffic, although there are ongoing FCC proceedings concerning VoIP. *See In the Matter of IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC No. 04-28, 19 F.C.C.R. 4863 (F.C.C. Mar. 10, 2004) ("*IP Rulemaking Notice*"). Among the issues on which the FCC is seeking comment are (1) "the extent to which access charges

should apply to VoIP and other IP-enabled services," and (2) how to classify the providers of these services. *Id.* at ¶ 61. *See generally VarTec Telecom, Inc.*, 2005 WL 2033416, at *4 (noting lack of FCC rules concerning VoIP service). Nonetheless, "[i]t is obvious from continuing debates over the proper classification of broadband and VoIP services that the purported 'bright line' between basic and enhanced services . . . increasingly is becoming blurred and subject to confusion." *Frontier Tel. of Rochester, Inc. v. USA Datanet Corp.*, 386 F.Supp.2d 144, 150 (W.D.N.Y. 2005) (quoting Richard S. Whitt, *A Horizontal Leap Forward: Formulating a New Communications Public Policy Framework Based on the Network Layers Model*, 56 Fed. Comm. L.J. 587, 652 (May 2004); (alteration in original).

Although the FCC has not yet issued regulations addressing VoIP, existing rules and orders establish how VoIP and other IP services should be treated in the interim. In a 1998 report to Congress, *In re Federal-State Joint Board on Universal Service, Report to Congress*, 13 F.C.C.R. 11,501 (1998) ("*Universal Service Report*"), the FCC first articulated standards to aid the communications industry in applying its existing definitions to various configurations of VoIP technologies. The FCC concluded that "computer-to-computer" IP telephony, in which phone service is provided over broadband facilities using non-traditional customer premises equipment such as a computer, would likely would be an "information service." *Universal Service Report*, ¶ 87. The FCC also discussed "phone-to-phone" IP telephony, which does not require customers to use equipment different from that used to place an ordinary touch-tone call, and "transmits customer information without a net change in form or content." *Id.*, ¶ 88. The record

suggested that phone-to-phone IP telephony was not an information service, and might be subject to access charges. *Id.*, ¶ 91.

. The FCC has issued two recent orders addressing specific VoIP services and a third order addressing it in the context of another statute. In the first order, the FCC concluded that "computer-to-computer" VoIP offered by Pulver.com constituted an "information service" because Pulver.com offered its customers the capability of "generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information." *In re Petition for Declaratory Ruling that Pulver. com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, 19 F.C.C.R. 3307, ¶¶ 4, 12, 26 (2004) ("*Pulver Order*").

In the second order, the FCC addressed a petition by AT & T regarding the regulatory classification of its "phone-to-phone" IP telephony service, which uses IP inside the long distance carrier's network to more efficiently provide transmission for voice calls that both originate and terminate as regular phone calls over the traditional telephone network. The FCC reasoned that the AT & T offering is a "telecommunications service" under the Act because, *inter alia*, it involves no "net protocol conversion" and uses "ordinary customer premises equipment (CPE) with no enhanced functionality." *AT & T Access Charge Order*, ¶ 1. The FCC emphasized that this rule applied only to AT & T's specific services and VoIP services that shared all of the characteristics which supported its determination that AT & T's ser-

vice was a telecommunications service.[15] *Id.*, ¶¶ 1, 11, 13, 15.

In the third order, the FCC addressed the petitions of several law enforcement agencies to clarify the scope of the Communications Assistance for Law Enforcement Act ("CALEA")[16] with respect to whether providers of broadband Internet access and VoIP services are regulable as "telecommunications carriers" under CALEA. *In re Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services*, 2005 WL 2347765, 20 F.C.C.R. 14,989, ¶¶ 15-16 (2005) ("*CALEA Order*"). Although the *CALEA Order* interprets a different statute, it is useful because the FCC examined the nature of VoIP services, offered its interpretation of aspects of the

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[15] The FCC described AT & T's VoIP service under consideration as: "an interexchange service that: (1) uses ordinary customer premises equipment with no enhanced functionality; (2) originates and terminates on the public switched telephone network (PSTN); and (3) undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology." *AT & T Access Charge Order*, ¶ 1. "No net protocol conversion occurs [during this particular type of VoIP service] because the telephone transmissions begin and end as ordinary telephone calls." *Southwestern Bell Tel., L.P. v. VarTec Telecom, Inc.*, 2005 WL 2033416, at *2, n.7 (E.D. Mo. Aug. 23, 2005).

"To avoid placing AT&T at a competitive disadvantage, the FCC ruled that all interexchange carriers providing IP telephony are required to pay access charges for calls that 'begin on the PSTN, undergo no net protocol conversion, and terminate on the PSTN.' [*AT & T Access Charge Order*] at ¶ 18. This rule applies whether the interexchange carrier provides its own IP voice services or contracts with another provider to do so. *Id.*" *VarTec Telecom, Inc.*, 2005 WL 2033416, at * 2.

[16] 47 U.S.C. §§ 1001-1010.

Act, and discussed significant differences between the statutory language of CALEA and that of the Act.

As relevant here, the FCC stated that the Act's definitions of "telecommunications service" and "information service" are mutually exclusive categories. *CALEA Order*, ¶¶ 15, 16. The Act's definition of "telecommunications" is "narrow" and only includes transmissions that do not alter the form or content of the information as sent and received. *Id.*; *see* 47 U.S.C. § 153(43). The FCC described VoIP as a hybrid service that contains both "telecommunications" and "information" components. *CALEA Order*, ¶¶ 39-45; *American Council on Educ. v. FCC*, 451 F.3d 226, 229 (D.C. Cir. 2006). The FCC stated that the Act requires it to "classify an integrated service offering as solely a telecommunications service or solely an information service depending on 'the nature of the functions that the end user is offered'." *CALEA Order*, ¶ 16. The FCC ruled that the telecommunications component of an integrated information service offering falls exclusively within the Act's information service category:

> a single entity offering an integrated service combining basic telecommunications transmission with certain enhancements, specifically "capabilities for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information," offers only an information service, and not a telecommunications service, for purposes of the [Telecommunications] Act if the telecommunications and information services are sufficiently intertwined.

CALEA Order, ¶ 15; *see id.*, ¶ 17.

These orders offer some guidance but also leave unanswered questions concerning the proper regulatory framework for services and applications that use the Internet to deliver voice and voice-based applications, including IP-PSTN. A key question is the application of the FCC's definitions of "information services" or "enhanced services" to these IP-based technologies. *IP Rulemaking Notice*, ¶¶ 35-36.

5. The MPSC's Ruling on IP-PSTN Traffic.

The Final Arbitrator's Report contained two separate, conflicting rulings concerning IP-PSTN traffic. The first ruling resolved MCI's issue concerning the terms and condition applicable to intrastate interexchange switched access traffic. The Arbitrator ruled in favor of MCI that IP-PSTN traffic should be charged at reciprocal compensation rates instead of switched access rates, because IP-PSTN traffic is an "enhanced service" that "falls squarely within the 'net-protocol change' portion of the FCC's multipart enhanced service definition." Final Arbitrator's Report at 21-22.

The second ruling addressed both PSTN-IP-PSTN and IP-PSTN, and resolved numerous issues presented by SBC, AT & T and several CLECs. The CLEC Coalition argued that the MPSC should refrain from incorporating any provisions concerning IP-PSTN and VoIP in the interconnection agreements until the FCC issued governing regulations. The Arbitrator proceeded to address the issues and after a lengthy recitation of the parties' positions ruled in favor of SBC that interexchange switched access traffic, including interexchange IP-PSTN traffic, is subject to switched access charges "for the reasons offered by SBC." Final Arbitrator's Report at 34-50.

The CLEC Coalition filed comments on the Final Arbitrator's Report, requesting clarification of the inconsistent rulings concerning IP-PSTN. In its comments on the Final Arbitrator's Report, SBC argued that it was arbitrary for the MPSC to adopt MCI's IP-PSTN proposal while excluding other carriers' IP-PSTN traffic from reciprocal compensation. In the Arbitration Order, the MPSC resolved the conflict by concluding that IP-PSTN traffic is subject to reciprocal compensation rather than access charges.

Discussion.

The Court concludes that the MPSC's decision subjecting IP-PSTN traffic to reciprocal compensation is consistent with the Act and the FCC's rules, and is not arbitrary or capricious. The decision is consistent with the FCC's orders because (1) federal law does not exempt IP-PSTN traffic from reciprocal compensation obligations, and (2) federal access charges are inapplicable to IP-PSTN traffic because such traffic is an "information service" or an "enhanced service" to which access charges do not apply.

1. Reciprocal Compensation.

The Act requires carriers to exchange reciprocal compensation for all "telecommunications," 47 U. S.C. § 251(b)(5), unless that particular form of telecommunications was regulated under a pre-Act compensation regime expressly preserved by § 251(g) of the Act. Id., § 251(g). Read together, these sections establish that carriers must exchange reciprocal compensation to transport and terminate telecommunications unless a separate pre-Act rule prescribed a different form of compensation for that form of communications. *See WorldCom, Inc.*, 288 F.3d at 433.

The reciprocal compensation obligation applies to IP-PSTN traffic because when a CLEC acts as a VoIP provider it uses "telecommunications" to transmit IP-PSTN traffic to the network of the carrier that provides service to the called party. The Act defines "telecommunications" as the "*transmission*, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U. S.C. § 153(43) (emphasis added). After the CLEC has converted a call that originates in IP format to Time Division Multiplex ("TDM") format,[17] it transmits voice communications from its network to the network of the called party's telecommunications provider. *See* IP-PSTN Service Diagram (Ex. D to MCI's Mem. Opp. to SBC's Mot. for Summ. J.). From that point forward, the communication is sent and received in TDM format, and involves no further change in form or content.

Because IP-PSTN is a new service developed after the Act, there is no pre-Act compensation regime which could have governed it, and therefore § 251(g) is inapplicable. *Cf. WorldCom, Inc.*, 288 F. 3d at 433-34 (Section 251(g) could not apply to ISP-bound traffic because there was no pre-Act regime specially

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[17] "Time Division Multiplexing, or 'TDM,' occurs when calls are digitized and broken up into segments. These segments are sent in order, with segments from other telephone calls placed in between, then reassembled at the other end." *SightSound.com, Inc. v. N2K, Inc.*, 185 F.Supp.2d 445, 459 (W.D. Pa. 2002).

A significant change in format—net-protocol conversion—occurs at an earlier stage of IP-PSTN communications. *See* MCI Ex. D. As will be discussed *infra*, that net-protocol conversion makes IP-PSTN an information service eligible for a special exemption to the payment of access charges.

governing compensation for that service). As a result, IP-PSTN traffic falls within the statutory mandate that reciprocal compensation be used to compensate carriers for transporting traffic between calling and called parties that subscribe to different carriers.

SBC argues that 47 C.F.R. § 51.701(b)(1) exempts three categories of traffic from reciprocal compensation and that "interexchange IP-PSTN" falls within the exemption because it is a non-local "interexchange" call. SBC Mem. at 25-26, 28. Although the FCC's *ISP Remand Order* initially interpreted § 251(g) as excluding the three categories of traffic from federal reciprocal compensation requirements, the D.C. Circuit reversed that interpretation, explaining that § 251(g) preserves only pre-Act compensation rules for those services. *WorldCom, Inc.*, 288 F.3d at 432-33; *see also Atlas Tel. Co. v. Oklahoma Comm'n*, 400 F.3d 1256, 1262-63 (10th Cir. 2005) (explaining operation of § 251(g)). Following the D.C. Circuit's ruling, the FCC abandoned its prior view and subsequently "disagreed with [the] assertion that every form of traffic listed in section 251(g) should be excluded from section 251(b)(5) reciprocal compensation."[18] *In re Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of*

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[18] Neither § 251(g) nor the corresponding FCC regulation identifies "interexchange traffic" as a category of traffic for which pre-existing rules are preserved. Instead, the three categories are exchange access, information access, and services for the provision of exchange or information access. SBC does not argue in its Memorandum that IP-PSTN traffic is exchange access or information access. Even if SBC's interpretation of § 251(g) were correct, it would not support SBC's contention that all traffic between end users in different exchanges is by definition excluded from reciprocal compensation.

the Virginia State Corporation Commission Regarding Interconnection Disputes With Verizon Virginia Inc, and for Expedited Arbitration, 17 F.C.C.R. 27,039, ¶ 261 (2002).

SBC's assertion that reciprocal compensation can only apply to "local" traffic, SBC Mem. at 26, is not supported by current law. As discussed above, the FCC's 1996 *Local Competition Order* focused on calls' jurisdictional status as "local." In 2001, however, the FCC relinquished its prior reliance on a call's jurisdictional status as "local" or "long distance" as a basis for determining its eligibility for reciprocal compensation. *ISP Remand Order*, ¶¶ 34-35; *Southern New England Tel. Co. v. MCI WorldCom Commc'ns, Inc.*, 353 F.Supp.2d 287, 298 (D. Conn. 2005). Thus, IP-PSTN traffic's status as a "local" call does not control whether it is subject to reciprocal compensation.

2. Access Charges.

SBC also argues that interexchange IP-PSTN traffic is subject to access charges and therefore is outside the reciprocal compensation regime. SBC Mem. at 28. This argument fails because federal access charges are inapplicable to an "information service" or "enhanced service." *AT & T Access Charge Order*, ¶ 4; *see also Brand X Internet Servs.*, 125 S. Ct. at 2696. Although the FCC has not yet ruled whether IP-PSTN is such a service, the orders it has issued lead to the conclusion that IPPSTN is an "information service."[19]

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[19] It is important to note that IP-PSTN traffic's status as an "information service," and not a "telecommunications service," does not take it beyond the scope of the "telecommunications" to which reciprocal compensation applies. By definition, infor-

As discussed *supra*, the FCC's "ESP exemption" excuses providers of "enhanced services" from paying access charges. *See ESP Exemption Order*, ¶ 2; *see also Southwestern Bell Tel. Co. v. Public Util. Comm'n of Texas*, 208 F.3d 475, 487 n.19 (5th Cir. 2000) (acknowledging ESP exemption). The *ESP Exemption Order* classifies enhanced service providers ("ESPs") as end users of telecommunications service. *ACS of Anchorage, Inc.*, 290 F.3d at 409. Because only "carriers" are subject to access charges, being an "end user" means that ESPs do not pay those charges. ESPs' status as end users places them outside the access charge regime "even for calls that appear to traverse state boundaries." *See Access Charge Reform Order*, ¶ 342. Although the ESP exemption was enacted as an interim measure, it remains in effect. *See ITC Deltacom Commc'ns, Inc.*, 62 F. Supp.2d at 1313. Consequently, if IP-PSTN traffic is an enhanced or information service, then the MPSC correctly ruled that CLECs should not pay access charges when they originate or terminate IP-PSTN traffic.

Now known as "information services," *Brand X Internet Services*, 125 S. Ct. at 2706, "enhanced services" are "services in which computer processing applications [were] used to act on the content, code, protocol, and other aspects of the subscriber's infor-

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mation services are provided "*via telecommunications*." 47 U.S.C. § 153(20) (emphasis added). Further, as previously discussed, CLECs provide telecommunications as part of their VoIP offerings because they transmit the communications to the LEC's network after the net-protocol conversion has occurred. The telecommunications feature does not subject the traffic to access charges because, as will be discussed, FCC rules exempt carriers from paying access charges when they offer information services.

mation, such as voice and data storage services, as well as protocol conversion (*i.e.*, ability to communicate between networks that employ different data-transmission formats)." *Id.* at 2697 (alteration in original; internal citations omitted); see also 47 C.F.R. § 64.702(a); *IP Rulemaking Notice*, ¶ 27 n.94. The Act defines an "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U. S.C. § 153(20).

Net-protocol conversion is a determinative indicator of whether a service is an enhanced or information service. *See In re Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 F.C.C.R. 21,905, ¶ 104 (1996). A net-protocol conversion occurs when "an end-user [can] send information into a network in one protocol and have it exit the network in a different protocol." *Id.* That conversion "transforms" information, and therefore provides an "enhanced" and an "information" service. *Id.*, ¶¶ 105–06.

IP-PSTN traffic is an information service within the meaning of the Act because it offers the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications. "[20] 47 U.S.C. § 153(20); *see Universal Service Report*, ¶ 39.

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[20] "[T]he FCC recognized that the architecture of information services would be built on top of existing telecommunications services infrastructure, but, in terms of regulation, would still remain separate for strong policy purposes." *Vonage Holdings Corp. v. Minnesota Pub. Util. Comm'n*, 290 F.Supp.2d 993, 1001 (D. Minn. 2003).

IP-PSTN also alters the form and content of the information sent and received, *see Brand X Internet Services*, 125 S. Ct. at 2697; 47 U.S.C. § 153(43), because it involves a net protocol conversion from the digitized packets of the IP protocol to the TDM technology used on the PSTN. *Vonage*, 290 F. Supp.2d at 1000; *see* Price Test. at 118. The communication originates at the caller's location in IP protocol, undergoes a net change in form and content when it is transformed at the CLEC's switch into the TDM format recognized by conventional PSTN telephones, and ends at the recipient's location in TDM. *Vonage*, 290 F. Supp.2d at 1000; *see* Ex. D to MCI's Mem. Opp. to SBC's Mot. Summ. J. Without this protocol conversion from IP to TDM, the called party's traditional telephone could not receive the VoIP call.[21] *See IP Rulemaking Notice*, ¶ 8 (noting that IP transmits data "in a manner fundamentally different than the way in which signals transit a circuit-switched service" on the PSTN). For these reasons, IP-PSTN is an information service. *See Vonage*, 290 F. Supp.2d at 1000 (holding that computer-to-phone VoIP is an "information service" rather than a "telecommunications service" under the Act).

The conclusion that IP-PSTN is an information service is supported by the FCC's orders addressing related issues. The FCC determined that AT & T's PSTN-IP-PSTN traffic is a telecommunications service because no net protocol conversion occurs, as the

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[21] It does not matter that there is a "voice" at both ends of an IP-PSTN call. The same is true of voicemail, which the FCC has long recognized is an information service. *See In re Schools and Libraries Universal Service Support Mechanism*, 18 F.C.C.R. 9202, ¶ 29 n.49 (2003).

traffic begins and ends on the conventional telephone network. *AT & T Access Charge Order*. In contrast, IP-PSTN service involves a net protocol conversion from IP format to TDM format. The FCC determined that a "computer-to-computer" VoIP service constituted an "information service" because it offered customers the capability of "generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information." *Pulver Order*. IP-PSTN is computer-to-phone VoIP, but also offers customers the capability of "generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information." As such, IP-PSTN also constitutes an information service. Finally, the FCC described VoIP as a hybrid service which has both telecommunications and information components and stated that under the Act, such an offering combining basic telecommunications with "capabilities for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information" falls exclusively within the information service category if the telecommunications and information services are sufficiently intertwined. *CALEA Order*, ¶ 15. IP-PSTN has both information and telecommunications components, which are intertwined to permit telephone communication between computer users and PSTN users.

For these reasons, the Court concludes that the Arbitration Order's decision subjecting IP-PSTN traffic to reciprocal compensation rather than access charges is consistent with federal law and should be affirmed.

3. Adequacy of Decision Making.

SBC also contends that the MPSC's final decision on the IP-PSTN issue was arbitrary and capricious

and resulted from a failure to engage in reasoned decision making. SBC contends that the MPSC resolved the Arbitrator's conflicting rulings regarding IP-PSTN traffic on the sole basis that the traffic "should be treated consistently" and without any explanation why the MPSC thought one approach was preferable to the other. SBC Mem. at 29 (citing Arbitration Order at 36); SBC Reply at 14.

The Court disagrees with SBC. The MPSC did more than simply state that the two rulings concerning IP-PSTN should be consistent. It articulated the carriers' competing positions and the basis for the Arbitrator's initial adoption of SBC's proposal that IP-PSTN should be subject to access charges. Arbitration Order at 35. It discussed the Coalition's arguments that (1) the *AT & T Access Charge Order* relied on by the Arbitrator holds only that access charges should apply to PSTN-IPPSTN traffic, and (2) IP-PSTN traffic is qualitatively different from PSTN-IP-PSTN because it is an enhanced service involving a net-protocol change and therefore should be charged at reciprocal compensation rates. Arbitration Order at 34-35. The MPSC then explained that the Arbitrator had adopted MCI's proposal because "IP-PSTN traffic . . . falls squarely within the 'net-protocol change' portion of the FCC's multipart enhanced service definition and is therefore appropriately charged at reciprocal compensation rates instead of switched access rates." *Id.* at 36. The MPSC further stated that all IP-PSTN traffic should be treated similarly, and modified the Final Arbitrator's Report to provide that the Coalition CLECs' interconnection agreements should provide that IP-PSTN traffic would be subject to reciprocal compensation rather than access charges. *Id.* at 36.

The MPSC's discussion of the conflicting rulings indicates its recognition that IP-PSTN traffic is an information service and is qualitatively different than PSTN-IP-PSTN traffic, which is a telecommunications service. This fulfilled the MPSC's obligation to base its decision on "a consideration of the relevant factors." *National Wildlife Fed'n v. Whistler*, 27 F.3d 1341, 1344 (8th Cir. 1994); *see also Southern New England Tel. Co. v. Connecticut, Dep't of Public Util. Co.*, 285 F.Supp.2d 252, 258 (D. Conn. 2003) ("A reviewing court may uphold an agency decision of 'less than ideal clarity if the agency's path may reasonably be discerned."). By modifying the Arbitrator's ruling to apply reciprocal compensation to IP-PSTN traffic under the interconnection agreements, the MPSC indicated that it found the rationale for adopting MCI's proposal more persuasive than SBC's position. The MPSC's decision was therefore not arbitrary or capricious.

Conclusion.

For the foregoing reasons, the Court concludes that the Arbitration Order neither violates federal law nor constitutes an arbitrary and capricious determination of the facts with respect to the issue of reciprocal compensation for IP-PSTN traffic. Accordingly, the Arbitration Order should be affirmed and SBC's motion for summary judgment should be denied on this issue.

IV.

Charter Fiberlink-Missouri, LLC's Motion for Summary Judgment.

Defendant Charter Fiberlink-Missouri, LLC ("Charter") moves for summary judgment on its Counterclaim/Cross-claim ("cross-claim"). Charter's cross-

claim challenges the MPSC's determination that exchange access charges, rather than the lower reciprocal compensation charges, apply to regular telephone calls that travel outside the local calling areas established by the state commission, even if the calls do not travel outside the originating carrier's local calling area for billing purposes. Charter would like to compete against SBC in the retail market by offering its customers a larger local calling area than SBC does, but under the Arbitration Order, Charter would be required to pay access charges to SBC for certain calls that travel outside SBC's local calling area even though the calls would not travel outside Charter's local calling area and Charter would not collect a toll from its customers on the calls.

SBC and the MPSC oppose Charter's motion for summary judgment. For the following reasons, Charter's motion should be denied.

Background.

As previously discussed, the Act imposes a duty on all telecommunications carriers to interconnect their networks either directly or indirectly with the facilities and equipment of other telecommunications carriers. 47 U.S.C. § 251(a). The Act also imposes a duty on local exchange carriers (LECs) "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." *Id.*, § 251(b)(5). "Reciprocal compensation is payment from the carrier who originates a call to the carrier who terminates or receives a call. Reciprocal compensation is intended to permit the carrier for the customer who receives a call to recoup from the caller's carrier those expenses incurred for terminating the call or sending it to its final destination."

WWC License, L.L.C., No. 05-1725, 2006 WL 2419162, *2 (citations omitted); 47 U.S.C. § 251(b)(5).

To facilitate compliance with the congressional mandate requiring interconnection and reciprocal compensation, the FCC issued rules requiring "reciprocal compensation for transport and termination of telecommunications traffic between LECs and other telecommunications carriers." 47 C.F.R. § 51.701(a). The obligation to pay reciprocal compensation applies to all telecommunications traffic except for "interstate or intrastate exchange access, information access, or exchange services for such access." 47 C.F.R. § 51.701(b)(1). All of these items are "access services" which "connect calls that travel to points—both interstate and intrastate—beyond the local exchange." *ISP Remand Order*, 16 F.C.C.R. 9168, ¶ 37. At issue on this motion are interstate and intrastate exchange service, commonly referred to as long-distance or toll calls. These calls are subject to "access charges," which are significantly higher than reciprocal compensation charges. Under the access charge scheme, an inter-exchange or intra-exchange carrier pays the LEC for its use of the LEC's local network facilities. *See, e.g.*, 47 C.F.R. § 69.124.[22]

Proceedings Before the MPSC.

As part of the arbitration proceedings before the MPSC, Charter and SBC submitted an issue concerning the definition of mandatory local calling areas. For purposes of their interconnection agreement, Charter and SBC disagreed as to whether the

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[22] "Information access" generally refers to calls from ILEC subscribers to dial-up Internet Service Providers served by a CLEC. This type of access is not at issue in Charter's motion for summary judgment.

local calling areas defined in SBC's MPSCapproved local exchange tariffs should control whether reciprocal compensation or access charges are appropriate for completing particular calls.

Charter proposed that the distinction between toll and local traffic for purposes of intercarrier compensation would be defined by the local calling area of the company that originates the call. Charter's proposed contract language provided in relevant part:

> For purposes of this Agreement only, Switched Access Traffic shall mean all traffic that originates from an end user physically located in one local exchange and delivered for termination to an end user physically located in a different local exchange (excluding traffic from exchanges sharing a common mandatory local calling area as defined in *the originating party's* local exchange tariffs on file with the applicable state commission). (Emphasis added).

In contrast, SBC proposed that the distinction between toll and local traffic for purposes of intercarrier compensation would be defined by SBC's mandatory local calling area in its local exchange tariffs filed with the MPSC. SBC's proposed contract language provided in relevant part:

> For purposes of this Agreement only, Switched Access Traffic shall mean all traffic that originates from an end user physically located in one local exchange and delivered for termination to an end user physically located in a different local exchange (excluding traffic from exchanges sharing a common mandatory local calling area as defined in *SBC 13-STATES's* local exchange tariffs on file with the applicable state commission). (Emphasis added).

After discussing each party's position, the Arbitrator adopted SBC's proposed language and stated that Charter's proposed language was "in conflict with applicable law and would be unworkable in practice." *See* Final Arbitrator's Report, § VI at 15-21. Charter challenged the arbitrator's decision on this issue, but the Arbitration Order did not modify the Final Arbitrator's Report and therefore the MPSC adopted the Final Arbitrator's Report as its decision on the issue. See Arbitration Order at 9.

Discussion.

Charter argues that this aspect of the Arbitration Order is plain error under controlling federal law and must be reversed. Charter contends that the Arbitration Order violates 47 C.F.R. § 51.701(b)(1), which defines telecommunications traffic for purposes of reciprocal compensation as "telecommunications traffic exchanged between a LEC and a telecommunications carrier . . ., except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access." 47 C.F.R. § 51.701(b)(1). Charter states that reciprocal compensation is the "default case," *i.e.*, that any type of traffic exchanged between two LECs should be subject to reciprocal compensation unless it is (1) interstate or intrastate exchange access, or (2) information access or exchange services for information access.

Charter states that the Act defines "exchange access" as referring only to the use of LEC services or facilities for the purpose of originating or terminating "telephone toll service," 47 U. S.C. § 153 (16), which in turn is defined as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts

with subscribers for exchange service." *See* 47 U.S.C. § 153(48). Charter contends that except in situations where it is asking SBC to terminate an actual toll call—i.e., a call for which Charter has charged its own customer a toll and then hands the call off to SBC—SBC is not providing "exchange access" on the call and reciprocal compensation applies.

Charter argues that the MPSC erred in relying on a superseded version of 47 C.F.R. § 51.701(b)(1), as interpreted by the FCC in the 1996 *Local Competition Order*, 11 F.C.C.R. at 16,013-14, ¶ 1035, in ruling that the MPSC had the authority to decide which carrier's calling area governs for purposes of reciprocal compensation. The key clause of this section defines which traffic is subject to reciprocal compensation. The version of 47 C.F.R. § 51.701(b)(1) in effect from 1996 through 2001 stated:

> Telecommunications traffic between a LEC and a telecommunications carrier other than a [wireless service provider] *that originates and terminates within a local service area established by the state commission*. (Emphasis added).

The current version of 47 C.F.R. § 51.701(b)(1) states:

> Telecommunications traffic between a LEC and a telecommunications carrier other than a [wireless service provider], *except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access*. (Emphasis added).

Charter argues that while the MPSC's ruling would be correct under the old rule, which applied reciprocal compensation only to traffic that began and ended within a state-defined, geographic local service area, it is incorrect under the new rule, which

makes no mention of geography or state commissions and provides that reciprocal compensation applies to all traffic except for exchange access and information access.

A similar argument to Charter's was squarely rejected in *Global NAPs, Inc. v. Verizon New England, Inc.*, 454 F.3d 91 (2d Cir. 2006). In *Global NAPs*, the Second Circuit was required to determine, *inter alia*, whether the Vermont Public Service Board "overstepped its authority in concluding that Board-determined calling areas govern whether traffic is subject to reciprocal compensation or access charges." *Id.* at 96-97. Global NAPs contended that "access charges are appropriate only in circumstances where a carrier imposes separate charges for long-distance calls," and because Global NAPs did not impose a separate charge for certain calls, access fees for those calls were inappropriate.[23] *Id.* at 97. The dispute in *Global NAPs*, as in this case, concerned which calling area provides the relevant framework for determining proper intercarrier compensation: the ILEC's calling area as determined by the public service commission, or the calling area as determined by the local, originating carrier. *Id.*

The Second Circuit concluded that despite the "monumental changes" Congress made in telecommunications law, the FCC has indicated its intent to leave authority over defining local calling areas within the jurisdiction of the state commissions:

> Prior to 1996, the state public service commissions defined the boundaries of all local calling areas. See [*Local Competition Order*], 11

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[23] Global NAPs treated all calls within the State of Vermont as local for billing purposes. *Global NAPs*, 454 F.3d at 97.

> F.C.C. Rcd. 15,499, 16,013-14, ¶ 1035 (1996). With the introduction of competition, however, the state boards were required to consider how to realign the local market to govern competitive entry. The FCC, in its voluminous *Local Competition Order*, explicitly declined to address the issue of carrier-determined local calling areas, noting that the "state commissions have the authority to determine what geographic areas should be considered 'local areas' for the purpose of applying reciprocal compensation . . . consistent with state commissions' historical practice of defining local service areas for wireline LECs." *Id.* Importantly, the FCC concluded that it lacked sufficient information to address the issue of expanded local calling area plans but "expect[ed] that this issue [would] be considered, in the first instance, by the state commissions." *Id.* Thus, despite the monumental changes Congress had made in telecommunications law, the FCC early indicated that it intended to leave authority over defining local calling areas where it always had been—squarely within the jurisdiction of the state commissions.

Global NAPs, 454 F.3d at 97.

The Second Circuit rejected the argument that a call could not be subject to access charges unless the originating carrier imposed a separate toll charge:

> Global argues that the 1996 Act does not permit the Board to reserve the authority to define local calling areas for intercarrier compensation purposes. It centers its argument on the "separate charge" language in the statutory definition of "telephone toll services" (which in turn defines exchange access, which in

> turn determines whether access charges apply). Global reasons that, since the regulations prescribe that a charge separate from the applicable service contracts is necessary to make a call a "toll" call and since Global imposes no separate toll charges, its traffic is not subject to access fees, regardless of how the Board defines local calling areas. This argument attributes far too much significance to the term "separate charge."
>
> The underlying statute (which we must remember was originally drafted in 1934) draws sharp distinctions between services known popularly as "local" and "long-distance." *See, e.g.*, 47 U.S.C. § 153(47)-(48). It seems likely that the "separate charge" language in the statute was written to underscore that "tolls" applied exclusively to long-distance service and were charged separately. But what really mattered in determining whether an access charge was appropriate was whether a call traversed local exchanges, not how a carrier chose to bill its customers. Thus, Global's argument that since it imposes no separate fee, its traffic cannot be considered toll traffic, is beside the point.

Global NAPs, 454 F.3d at 98.

The Court affirmed the public service board's conclusion that the calling areas it had established were determinative for purposes of intercarrier compensation, based on the FCC's rulings and congressional intent as expressed in the Act:

> Accordingly, we decline to challenge the Board's conclusion that the calling areas it has established are determinative for the purposes of

intercarrier compensation. In fact, the FCC has stated "that state commissions have authority to determine whether calls passing between LECs should be subject to access charges or reciprocal compensation for those areas where the LECs' service areas do not overlap." *See In the Matter of Petition of Worldcom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes*, 17 F.C.C. Rcd. 27,039, 27,307, ¶ 549 & n.1824 (2002) [*Virginia Arbitration Order*]. Although much of the *Local Competition Order* has been superseded, we find nothing in the thousands of pages the FCC has issued on topics relating to local calling areas that clearly and consistently indicates that it intended to preempt the state commissions' authority to define local calling areas for the purposes of intercarrier compensation. Our understanding, which is consistent with conclusions that other courts have reached, is that the FCC has not disturbed the states' traditional authority to define local calling areas. *See, e.g., Iowa Network Servs. v. Qwest Corp.*, 385 F.Supp.2d 850, 858-59 (S.D. Iowa 2005); *Sprint-Fla, Inc. v. Jaber*, 885 So.2d 286, 293-94 (Fla. 2004). This understanding also appears to be consistent with Congress's intent in the 1996 Act. *See, e.g.*, 47 U.S.C. § 261(b)-(c) ("[n]othing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to February 8, 1996, or from prescribing regulations after February 8, 1996, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part" and

> "[n]othing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part").

Global NAPs, 454 F.3d at 98-99.

Finally, the Second Circuit expressed concern that if competing carriers were permitted to define local calling areas for purposes of intercarrier compensation, ILECS would eventually be required to absorb all of the infrastructure costs while CLECs reaped all of the profits:

> Allowing the state-commission-determined local calling areas to govern intercarrier compensation also makes good practical sense. Carriers may prescribe markedly different local calling areas in accordance with marketing considerations. This diversity may promote consumer choice and ultimately be beneficial to consumers. But, if carriers were free to define local calling areas for the purposes of intercarrier compensation, the door would be open to overweening conduct by the CLECs. ILECs are currently fixed in state-commission-imposed regimes and, in that framework, provide the infrastructure for CLECs. Local calling areas defined by CLECs would permit such areas to be so broad as to eliminate all intercarrier compensation for ILECs. Permitting CLECs to define local service areas and thereby set the rules for the sharing of infrastructure

> would eventually require ILECs to absorb all the costs and allow CLECs to reap all the profits.

Id., 454 F.3d at 99.

The Court finds the Second Circuit's reasoning persuasive, particularly in light of the FCC's 2002 ruling that state commissions retain the authority to determine whether access charges or reciprocal compensation apply when LECs' service areas do not overlap. *See Virginia Arbitration Order*, 17 F.C.C.R. at 27,307, ¶ 549. In addition, in the 2001 *ISP Remand Order* that precipitated the rule amendment on which Charter relies, the FCC stated that reciprocal compensation is not due for "access services," which uniformly "connect calls that travel to points—both interstate and intrastate—*beyond the local exchange.*" *ISP Remand Order*, 16 F.C.C.R. at 9168, ¶ 37 (emphasis added). Further, as SBC notes, the *ISP Remand Order* and the rule amendment were prompted by a completely different problem not at issue here—the abuse of reciprocal compensation by CLECs marketing largely to Internet Service Providers.[24] *See ISP Remand Order*, 16 F.C.C.R. at 9183, ¶ 7 1. The *ISP Remand Order* was intended to address this specific problem consistent with a prior federal court remand, and not to undermine long-standing state commission authority in the manner

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[24] Internet Service Providers ("ISPs") normally receive calls from, but do not place calls to, their dial-up customers, and those calls tend to last for long periods of time. By targeting ISPs as customers, but not ordinary private callers, CLECs could receive enormous and unearned reciprocal compensation windfalls from ILECs, which the FCC described as undermining "the operation of competitive markets" and hindering "viable, long-term competition." ISP *Remand Order*, 16 F.C.C.R. at 9183, ¶ 71.

Charter suggests. The *Virginia Arbitration Order* ruling makes clear that neither the *ISP Remand Order* nor the amendment to 47 C.F.R. § 51.701(b)(1) deprives state commissions of the authority to establish local calling areas for purposes of reciprocal compensation and access charges.

Conclusion.

For these reasons, the Court concludes that the MPSC's decision to use the local calling areas defined in SBC's MPSC-approved local exchange tariffs to determine whether reciprocal compensation or access charges are appropriate for completing particular calls does not conflict with federal law. The Arbitration Order should therefore be affirmed on this issue and Charter's motion for summary judgment should be denied.

V.

Summary and Conclusion.

For the foregoing reasons, the Court concludes that (1) it has subject matter jurisdiction over this matter and the Missouri Public Service Commission's motion to dismiss for lack of subject matter jurisdiction should be denied; (2) the MPSC's motions to strike should be denied; (3) Southwestern Bell Telephone, L.P.'s motion for summary judgment should be granted in part and denied in part as set forth in this Memorandum and Order; (4) Sprint Communications Company, L.P.'s motion for summary judgment should be granted; and (5) Charter Fiberlink-Missouri, LLC's motion for summary judgment should be denied.

Accordingly,

IT IS HEREBY ORDERED that the Missouri Public Service Commission's motion to dismiss for lack of subject matter jurisdiction is DENIED. [Doc. 48]

IT IS FURTHER ORDERED that the Missouri Public Service Commission's motions to strike directed to portions of Southwestern Bell Telephone, L.P.'s Complaint and portions of Charter Fiberlink-Missouri, LLC's Counterclaim/Cross-claim are DENIED. [Doc. 50, 73]

IT IS FURTHER ORDERED that plaintiff Southwestern Bell Telephone L.P.'s motion for summary judgment is GRANTED in part and DENIED in part; the motion is GRANTED with respect to SBC's contention that the MPSC lacks jurisdiction to order § 271 unbundling obligations to be included as part of interconnection agreements arbitrated pursuant to § 252, and that the Arbitration Order is preempted by federal law in this regard (Issue 1); the motion is DENIED with respect to (1) SBC's claims concerning access to entrance facilities for interconnection purposes at TELRIC rates pursuant to 47 U.S. C. § 251(c)(2) (Issue 2); (2) SBC's claims concerning reciprocal compensation for IP-to-PSTN traffic (Issue 3); and (3) all claims asserted in SBC's Complaint which were not included in its motion for summary judgment. [Doc. 84]

IT IS FURTHER ORDERED that defendant Sprint Communications Company, L.P.'s cross-motion for summary judgment is GRANTED on ¶¶ 50.h., 50.j., and 50.k. of SBC's Complaint. [Doc. 91]

IT IS FURTHER ORDERED that defendant/counter-claimant/cross-claimant Charter Fiberlink-Missouri, L.L.C.'s motion for summary judgment is DENIED. [Doc. 85]

IT IS FURTHER ORDERED that the Missouri Public Service Commission's Arbitration Order dated July 11, 2005 is contrary to federal law and pre-empted to the extent that it orders 47 U.S.C. § 271 unbundling obligations to be included as part of Southwestern Bell Telephone, L.P.'s interconnection agreements arbitrated pursuant to 47 U.S.C. § 252, including the requirements that SBC (1) fill new orders for unbundled local switching or the network elements which together comprise the UNE Platform, and (2) continue offering unbundled access to de-listed network elements.

IT IS FINALLY ORDERED that the Arbitration Order dated July 11, 2005 is otherwise AFFIRMED.

An appropriate declaratory judgment and permanent injunction will accompany this memorandum and order.

/s/ Charles A. Shaw
CHARLES A. SHAW
UNITED STATES DISTRICT JUDGE

Dated this 14th day of September, 2006.

APPENDIX C

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Case No. TO-2005-0336

[Logo]

Southwestern Bell Telephone, LP., d/b/a SBC Missouri's Petition for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection Agreement to the Missouri 271 Agreement ("M2A").

ARBITRATION ORDER

Issue Date: July 11, 1005

Effective Date: July 11, 2005

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ARBITRATION ORDER

Procedural History

Petition for Arbitration:

This arbitration commenced on March 30, 2005, when Southwestern Bell Telephone, L.P., doing business as SBC Missouri, filed its Petition for Arbitration with the Commission pursuant to Section 4.2 of the M2A, Section 252 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified as various sections of Title 47, United States Code ("the Act"), and Commission Rule 4 CSR 240-36.040. SBC's petition asked the Commission to arbitrate unresolved issues in the negotiation of interconnection agreements ("ICAs")

between SBC and various competitive local exchange carriers ("CLECs") to replace the M2A, the generally-available interconnection agreement approved by the Commission on March 15, 2001, in conjunction with its recommendation to the United States Federal Communications Commission ("FCC") that SBC be approved to provide in-region long distance service in Missouri pursuant to Section 271 of the Act.[1]

The procedural history of this case up to the filing of the Arbitrator's Final Report are set out in that report and need not be repeated here.

The Arbitrator's Final Report:

Due to the shortened schedule for this arbitration, the Arbitrator did not issue a Draft Report as called for by Rule 4 CSR 240-36.040(19). Instead, the Arbitrator filed his Final Arbitration Report of some 2,075 pages on June 21.[2] The report included the Decision Points ("DPs") formulated by the parties, grouped topically so far as possible, a discussion of pertinent points on each DP and a decision. The report also included both summary and detailed matrices showing the proposed contractual language selected for inclusion in each ICA.

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[1] In the Matter of the Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act of 1996, Case No. TO-99-227, (Order Regarding Recommendation on 271 Application Pursuant to the Telecommunications Act of 1996 and Approving the Missouri Interconnection Agreement (M2A), issued March 15, 2001).

[2] The Arbitrator issued his Final Arbitration Report on the 26th day following the end of the hearing and on the 15th day after the parties filed their Briefs.

The Parties' Comments:

The parties filed comments on the Final Arbitrator's Order on June 24. Rule 4 CSR 240-36.040(20) concerns the parties' comments on the draft arbitration report. In the present case, there was no draft arbitration report and the parties filed comments on the Final Arbitration Report instead. Rule 4 CSR 240-36.040(20) states:

> Each party and any member of the public may file comments on the arbitrator's draft report within ten (10) days after it is filed with the commission. Such comments shall not exceed twenty (20) pages, unless otherwise authorized by the arbitrator, and shall be directed to perceived factual, legal or technical errors made in the draft report. Commenters shall make specific references to the record to support each claim of error. Comments that merely reargue positions taken in briefs will be accorded no weight. Reply comments, if permitted by the arbitrator, shall be limited to identifying misrepresentations of law, fact or condition of the record contained in comments.

Generally speaking, the parties' comments fell into certain categories. First, parties asserted that the Arbitrator had overlooked certain Decision Points ("DPs"), either by failing to provide a decision where the issue remained open or by providing a decision where the issue had been settled. Second, parties complained that certain of the Arbitrator's decisions were inconsistent, either because the Arbitrator's decision on one DP appeared to contradict his decision on another DP elsewhere in his report or because the selected contractual language appeared to be inconsistent with the Arbitrator's stated deci-

sion. In some cases, such inconsistencies appear to reflect the fact that none of the offered language was appropriate or desirable. Third, parties objected to various of the Arbitrator's decisions as being contrary to law. Fourth, parties objected to various of the Arbitrator's decisions as being a bad policy choice.

With respect to those DPs that the parties contend the Arbitrator should not have decided because they were already settled, the Commission points out that it need take no action because the parties are free, under the Act, to substitute their negotiated resolution for any decision of the Arbitrator. Therefore, the parties should simply file their ICA containing the language on which they mutually agree.

Oral Arguments:

The Commission heard oral arguments on June 29 and 30. Each party was permitted to argue affirmatively in support of its comments and in opposition to the comments filed by other parties.

The Commission's Decision:

Rule 4 CSR 240-36.040(24), "Commission's Decision," provides:

> The commission may conduct oral argument concerning comments on the arbitrator's final report and may conduct evidentiary hearings at its discretion. The commission shall make its decision resolving all of the unresolved issues no later than the two hundred seventieth day following the request for negotiation.[3] The com-

[3] The M2A provides that negotiations on successor ICAs must start by the 135th day prior to its expiration and, where negotiations are ongoing, that the M2A will remain in effect for 135 days following its expiration, making a total of 270 clays.

> mission may adopt, modify or reject the arbitrator's final report, in whole or in part.

In modifying the Final Arbitration Report, the Commission may, as necessary, "[adopt] a result not submitted by any party that is consistent with the requirements of section 252(c) of the Act, and the rules prescribed by the commission and the Federal Communications Commission pursuant to that section."[4]

Like the Arbitrator, the Commission must be guided by Section 252(c) of the Act, which provides:

> In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall—
>
> (1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;
>
> (2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and
>
> (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

With respect to the public interest in the regulation of telecommunications, the Missouri General Assembly has provided an express statement of public policy to guide the Commission:[5]

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[4] Rule 4 CSR 240-36,040(5)(E).

[5] Section 392.185, RSMo Supp. 2002.

The provisions of this chapter shall be construed to:

(1) Promote universally available and widely affordable telecommunications services;

(2) Maintain and advance the efficiency and availability of telecommunications services;

(3) Promote diversity in the supply of telecommunications services and products throughout the state of Missouri;

(4) Ensure that customers pay only reasonable charges for telecommunications service;

(5) Permit flexible regulation of competitive telecommunications companies and competitive telecommunications services;

(6) Allow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest;

(7) Promote parity of urban and rural telecommunications services;

(8) Promote economic, educational, health care and cultural enhancements; and

(9) Protect consumer privacy.

The Role of the Arbitrator in the Ongoing Proceedings:

At the Oral Argument on June 29, a member of the Commission raised a question concerning the propriety of the participation of the Arbitrator in the second step of the two-step arbitration proceeding contemplated by the Commission's rule.[6] In the first

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[6] Tr. 1192.

step, the Arbitrator independently conducted proceedings that culminated in the Final Arbitrator's Report. In the second step, the parties have addressed written comments and oral arguments to the Commission in an effort to modify portions of the Final Arbitrator's Report. Commissioner Gaw questioned whether it was appropriate for the Arbitrator to preside given the fact that it was his decision that was the subject of the parties' various objections.

The Arbitrator polled the parties on June 29, and none expressed any objection to his presiding at the Oral Argument.[7] However, SBC's counsel stated:

> MR. LANE: I certainly don't have any objection to your presiding. I think when the Commission goes to reach its decision, if it needs assistance from someone in the General Counsel's office, or more appropriately maybe in the Regulatory Law Judges' office, it would probably be better to at least have somebody else involved in that process. But I certainly don't have any objection to your presiding over this.
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> * * *
>
> MR. LANE: And to clarify my remarks before we go on, I think our view of it is that the Commission's review here is de novo, and that's a critical factor, and that's where my comments go.[8]

The Commission's Arbitration Rule does not expressly address this point. However, it does provide that the Arbitrator shall merely produce a report to the Commission, as he has done here. This report is

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[7] *Id.*, at pp. 1192-1194.

[8] *Id.*, 1192-1193, 1194.

not a decision and will not become one, although it may be embodied by the Commission into its decision, in whole or in part. The Commission's proceedings on the Arbitrator's Report, consequently, are not in the nature of an appeal or review. It is, instead, an original proceeding.

For these reasons, the Commission concludes that there is no reason why the Arbitrator cannot participate in the Commission's proceedings.

Further Proceedings:

The Procedural Schedule called for this Commission's Order to be issued by July 6, and provides for subsequent proceedings as follows:

Successor interconnection Agreements All Parties	July 13, 2005 4:00 p.m.
Commission Approval of Successor Interconnection Agreements	July 19, 2005 4:00 p.m.

DECISION

The Missouri Public Service Commission hereby adopts the Final Arbitrator's Report as its decision on each unresolved issue, except as that Report is expressly modified below. The Final Arbitrator's Report is incorporated into this Order by reference.

DETAILED ANALYSIS OF COMMENTS

The Commission addresses only those comments here that, in its opinion, required some modification of the Arbitrator's Final Report. All other requested modifications have been considered and rejected.

A. AT&T's Comments:

1. Routine Network Modifications:

AT&T UNE Issue 6: Should SBC MISSOURI's obligation to provide UNEs, if they can be made

available via routine network modification, be dependent upon SBC's determination of whether spare facilities exist?

AT&T UNE Issue 18: How should routine network modifications be described in the ICA? Is SBC entitled to charge AT&T for routine network modifications?

Discussion:

AT&T contends that the Arbitrator erred in adopting SBC's proposed language limiting its obligation to perform routine network modifications to spare facilities and by also including language in the UNE Attachment regarding ICB prices for routine network modifications. The Arbitrator found as follows:

SBC Missouri may not limit "routine network modifications" to the attachment of electronics to DS1 Loops. SBC Missouri may recover the costs of such routine network maintenance through either recurring or nonrecurring rates. To the extent that it has an unbundling obligation under §251(c)(3), it must provide the service at TELRIC rates; to the extent that the obligation remains under §271, then the service must be provided at just and reasonable rates.[9]

AT&T states that the purported inconsistencies are found in the Detailed Matrix attached to the UNE section of the Arbitrator's Final Report, which indicates that the Arbitrator adopted SBC's proposed language for section 2.5, including the spare facilities language, as well as SBC's proposed ICB language in sections 4.8.7, 8,57.6 and 15.12.6. AT&T states that

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[9] Arbitrator's Report, Section III at p. 59.

the Commission should (1) delete the word "spare" from section 2.5 of the language selected by the Arbitrator and (2) delete SBC's proposed language at sections 4.8.7, 8.5,7.6, and 15.12.6 of the UNE attachment.

Decision:

The Commission agrees with AT&T. The language AT&T objects to is indeed inconsistent with other parts of the Arbitrator's Report as AT&T has pointed out. The Commission therefore modifies the Report by deleting the word "spare" from section 2.5 of the language selected by the Arbitrator and deleting SBC's proposed language at sections 4.8.7, 8.5.7.6, and 15.12.6 of the UNE attachment.

2. Access to Digital Cross-connect System (DCS):

UNE Issue 20: Should SBC be required to provide access to DCS, and, if so, under what terms and conditions?

Discussion:

AT&T states that the Arbitrator erred by adopting SBC's language limiting access to DCS to that provided under SBC's federal tariff. The Arbitrator's Final Report on this issue simply stated that it had been discussed above. The attached Detailed Matrix adopted SBC's proposed language. AT&T asserts that the Arbitrator thereby erred because, to the extent that SBC still has an obligation to provide access to dedicated transport an on unbundled basis, SBC is also obligated to provide access to DOS as a UNE pursuant to § 251 of the Act. AT&T thus alleges an error of law.

AT&T contends that the continued availability of Dedicated Transport at cost-based rates is essential

to competition in the local phone market. AT&T explains that DCS is a device that enables a CLEC to access and manage the digital signals of loop and transport facilities and may also provide multiplexing functions and test access capabilities. AT&T points to testimony showing that the DCS confers upon a carrier the significant abilities to groom facilities and optimize trunk and facility utilization.[10] AT&T argues that SBC should be obligated to provide access to DOS as a functionality that is part of the unbundled Dedicated Transport UNE.

SBC's position with respect to DCS is that there is no requirement that SBC Missouri provide access to DCS as a UNE since the FCC has found that DCS is required only with an entrance facility and both the *TRO* and *TRRO* clearly state that entrance facilities are not UNEs. According to SBC, the FCC requires only that DCS be offered: "in the same manner that the incumbent LEC provides such functionality to interexchange carriers."[11] Since services are not offered to IXCs as UNEs, there is no rationale for SBC Missouri being required to provide the DCS to CLECs as UNEs either.[12]

Decision:

AT&T points out that the Arbitrator determined, elsewhere in his Report, as follows:

> The Arbitrator notes that the TRO and *TRRO* limited dedicated transport to facilities between ILEC offices, so DCS need not be provided as part

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[10] Rhinehart Direct Testimony at p. 61.

[11] With the First Report & Order 47 C.F.R. §51.319(d)(2)(iv) and again with the UNE Remand Order §51,319(d)(2)(D).

[12] Silver Direct, pp. 122-125; Smith Direct, pp. 32-34; Smith Rebuttal, pp. 12-14.

of that UNE but rather on a wholesale basis as SBC suggests.[13]

Similarly, at page 6 of the Pricing Section of the Report, the Arbitrator found the following with regards to cross connects to DCS 4-Wire:

> SBC does not propose to include these services in the contract as they are not Section 251(c)(3) elements. Under the FCC rules, DCS is not a UNE; instead it is a special access functionality which is available under the special access tariff to CLECs and IXCs on an equal basis as required by the FCC rules. Decision: The Arbitrator agrees with SBC for the reasons stated above."[14]
>
> The Commission concludes that the Arbitrator did not err.
>
> 3.Should the Temporary Rider contain language regarding the manner in which SBC converts delisted elements?
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> AT&T Temporary Rider Issue 4b: Should the Rider contain language regarding the manner in which SBC converts delisted elements?
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> Discussion:

AT&T states that, with regards to UNE Rider Issue 4, the Arbitrator adopted SBC's language in places and adopted AT&T's language in other places. AT&T comments on two sections of its proposed language that the Arbitrator rejected, as well as three related sections of SBC's proposed contract language that the Arbitrator adopted, that are "arguably" inconsistent with other determinations

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[13] Final Arbitrator's Report, Section IV Pricing, p. 15.

[14] *Id.*, p. 6.

the Arbitrator made.

First, the Arbitrator rejected AT&T's proposed sections 2.3.4.1 and 2.3.4.2 in their entirety. The language in section 2.3.4.1 would ensure that conversions from transitional elements would take place "in a seamless manner without any customer disruption or adverse effects to service quality." The language further provides that the parties will work together to develop a mutually agreeable conversion process. The end of AT&T's proposed section 2.3.4.1 provides that if the parties cannot agree on a mutually agreeable conversion process, the deadline for conversions is extended and SBC will continue to bill the transitional rates. The Language in section 2.3.4.2 rejected by the Arbitrator is a companion to this language at the end of section 2.3.4.1, and provides that SBC may true-up to collect the difference between the transitional rates and the rates for the applicable alternative arrangement between the end of the transition period and the date the conversion requests are completed. Thus, AT&T's proposed section 2.3.4.2 ensures that SBC will be able to bill the full amount for post-transition services and will not suffer any monetary shortfall by being required to provide elements at the transitional rates past the end of the transitional period.

AT&T states that the language in section 2.3.4.1 and 2.3.4.2 is necessary to ensure that its customers are not negatively impacted by the conversion process. AT&T contends that it is also consistent with the principles behind the *TRRO*, in which the FCC, recognizing that the order was removing significant unbundling obligations that had formerly been placed on SBC, stressed the need for an orderly transition for competitive carriers and their customers from

UNEs to alternative facilities or arrangements.

AT&T asserts that the Arbitrator also erred in adopting SBC's proposed language at sections 3.3, 3.3.1 and 3.3.2. The language in sections 3.3 and 3.3.2 is identical, and provides as follows:

> CLEC shall be fully liable to SBC Missouri to pay such pricing under the Agreement, including applicable terms and conditions setting forth interest and/or late payment charges for failure to comply with payment terms, notwithstanding anything to the contrary in the Agreement.

Section 3.3.1 is related, and provides:

> Regardless of the execution or effective date of this Rider or the underlying agreement, CLEC will be liable to pay the Transitional Pricing for Mass Market ULS Element(s) and Mass Market UNE-P, beginning March 11, 2005.

AT&T claims that the language adopted in these sections is potentially inconsistent with other language that the Arbitrator adopted, which provides:

> Regardless of the execution or effective date of this Rider or the underlying Agreement, CLEC agrees that the Transitional Pricing for all Affected Loop-Transport Element(s), shall apply beginning March 11, 2005, SBC Missouri will not bill AT&T for such rates, nor shall the difference in the Transitional Prices be due, prior to the execution of this rider.

In making this determination, the Arbitrator rejected SBC's proposed section 2.3.1, which is analogous to SBC's section 3.3.1, which the Arbitrator adopted.

AT&T states that the net effect of the Arbitrator's decision on sections 2.3.1, 3.3, 3.3,1 and 3.3.2 is that for Transitional Loop-Transport elements, although AT&T agrees to pay the transitional pricing for loop transport elements beginning March 11, 2005, SBC is not allowed to bill for the transitional rates until after the Rider has been executed. Because SBC cannot bill until after execution of the Rider, late charges and interest cannot apply until after that date. However, for transitional switching elements and UNE-P, AT&T is liable for the transitional rates beginning March 11, 2005, and SBC is entitled to impose late payment charges and interest beginning on that date. These conflicting results should be reconciled by adoption of AT&T's sections 3.3 and 3.3.1 and rejection of SBC Missouri's sections 3.3, 3.3.1 and 3.3.2.

Decision:

First, with respect to AT&T's comments regarding sections 2.3.4.1 and 2.3.4.2, the Commission finds that AT&T's assertion of error is that the Arbitrator has made a bad policy choice. That assertion of error is not within the scope permitted by Rule 4 CSR 240-36.040(20) and will be disregarded.

Second, with respect to AT&T's argument that its sections 3.3 and 3.3.1 should be adopted in place of SBC Missouri's sections 3.3, 3.31 and 3.3.2 in order to avoid an "arguable" inconsistency, the Commission finds that the provisions in question are indeed inconsistent. The Commission will modify the Report to provide that, regardless of the date of execution of the Rider or the date when SBC may bill, AT&T shall be liable for the transitional rates beginning March 11, 2005, and SBC shall be entitled to impose late payment charges and interest beginning on that date.

SBC's proposed section 3.3.1 is adopted in place of AT&T's proposed section 2.3.1.

4. DCS Pricing:

AT&T Pricing Issue 1: What are the appropriate cost-based rates for the elements in dispute between the Parties?

AT&T Pricing Issue 3: Should DCS rates be included in the ICA or should the ICA reference SBC's federal tariff for these rates?

Discussion:

AT&T states that the Arbitrator erred in determining that rates for DCS and DCS cross-connects need not be included in the ICA. AT&T explains that these issues are related to AT&T UNE issue 20. AT&T states that, if the Commission reconsiders the Arbitrator's determination on AT&T UNE Issue 20, then pricing for DCS and related cross-connects should be included in the Schedule of Prices.

Decision:

The Commission finds that the Arbitrator did not err in his decision with respect to AT&T UNE Issue 20. For this reason, pricing for DCS and related cross-connects need not be included in the Schedule of Prices.

5. Voice Grade Dedicated Transport Cross-Connects:

AT&T Pricing Issue 1: What are the appropriate cost-based rates for the elements in dispute between the Parties?

Discussion:

AT&T states that the Arbitrator erred in determining that rates for voice grade dedicated transport cross-connects need not be included in the ICA, The Arbitrator noted in Pricing Issue 1 that "S BC proposes no prices as the provision of these cross connects is not subject to Section 251(c)(3) as no finding of impairment has ever been made by the FCC on voice grade dedicated transport. Decision: The Arbitrator agrees with SBC for the reasons stated above." This finding, however, is inconsistent with the Arbitrator's finding on Pricing Issue 5, regarding whether rates for voice grade/DSO dedicated transport should be included in the ICA. The Arbitrator, at page 17 of the Pricing Section of the Report, agreed with AT&T that rates for voice grade dedicated transport should be included. That finding is consistent with his ruling on a related UNE Issue. Given that the Arbitrator has determined that voice grade dedicated transport is a UNE, and that rates for it should remain in the ICA, AT&T argues that the Commission should reverse the inconsistent determination that voice grade dedicated transport cross-connects are not available under the ICA. Voice grade dedicated transport is of little utility without corresponding cross-connects.

Decision:

The Commission concurs with AT&T. Because the Arbitrator determined that voice grade dedicated transport is a UNE and that rates for it should remain in the ICA, it follows that the ICA must also include rates for voice grade dedicated transport cross-connects. The Final Arbitrator's Report is modified in this respect. The parties shall incorporate the language proposed by AT&T in their ICA.

6. SBC's Section 6.1:

AT&T NIA Issue 10: Should interconnection trunks carry all 251(b)(5) traffic, including ISP bound and transit traffic, as well as intraLATA exchange traffic?

Discussion:

AT&T states that the Arbitrator erred by adopting only a part of SBC's proposed language that was found to be consistent with the Report. For this particular issue, as it does for other Network issues, the Arbitrator's Report points to the Commission's recently adopted Enhanced Record Exchange rules in 4 CSR 240-29.10 *et seq.* AT&T asserts that those rules cannot be applied in circumstances where they conflict with the Act. The Detailed Decision Matrix indicates that all of AT&T's proposed language for this issue is consistent with the Arbitrator's Report. The Matrix, however, also indicates that SBC's proposed language for Attachment 11, Part C, § 6.0, is consistent with the Report, but goes on to state that SBC's proposed language for Attachment 11, Part C, § 6.1 is not consistent with the Report. It is unclear to AT&T why the Report considers § 6.1 to be inconsistent with the Report. AT&T states that it would be an error to include § 6.0 in the ICA without also including § 6.1.

AT&T states that §§ 6.0 and 6.1 are companion paragraphs that operate in a reciprocal fashion. Section 6.0 addresses AT&T's routing of traffic to SBC and § 6.1 addresses SBC's routing of traffic to AT&T and from AT&T's perspective they impose reciprocal obligations. AT&T does not object to the inclusion of SBC's language for § 6.0 as long as § 6.1 is also included, since it would be discriminatory against AT&T to only include § 6.0. Therefore, the

Arbitrator's Report should be corrected to also find that § 6.1 should be included in the ICA. AT&T thus alleges an inconsistency.

Decision:

The Commission concurs with AT&T. The Arbitrator's Report is modified to provide that the parties' ICA shall also include SBC's § 6.1, as follows:

> SBC MISSOURI shall route Section 251(b)(5)/ IntraLATA Toll Traffic destined for the AT&T Switch Center over a Local Interconnection Trunk Group from an SBC MISSOURI Local Tandem or when AT&T agrees to establish DEOTs over a direct end office Local Interconnection Trunk Group from an SBC MISSOURI End Office. SBC MISSOURI shall route Section 251(b)(5) Traffic and ISP—Bound Traffic destined for the AT&T Switch Center over a Local Only Trunk Group from an SBC MISSOURI Local Only Tandem Switch.

B. Charter Fiberlink's Comments:

1. At what point must a CLEC establish additional POIs with a LATA?

Charter NIM issue 1: (c) When CLEC selects a single POI, should this appendix contain language detailing the need for CLEC to establish additional POIs when CLEC reaches the appropriate threshold of traffic?

Discussion:

Charter states that the underlying issue here is the establishment of physical points of interconnection ("POIs") where Charter and SBC will physically link up their networks in order to exchange traffic.[15] The

[15] The parties' competing contract language on this point is set out in the Charter-SBC NIM DPL, Issue No. 1(c) at pp. 2-3.

Arbitrator held—correctly, in Charter's view that CLECs may establish a single, LATA-wide POI to exchange all traffic with SBC.[16] He also noted that, under 47 U.S.C. § 251 (c)(2), interconnection must be "technically feasible."[17] Charter states that it follows that SBC may reasonably require an additional POI if SBC can show that it is technically infeasible to keep using the POI or POIs already in place.

Charter states that, given the Arbitrator's decision, it follows that Charter's proposed contract language is to be preferred. However, the Detailed Matrix attached to Section V of the Arbitrator's Final Report states that it is SBC's language that is more consistent with the Arbitrator's substantive rulings. Charter urges the Commission to correct this inconsistency.

Decision:

The Commission concurs with Charter that the Detailed Matrix is inconsistent with the Arbitrator's stated decision. The Arbitrator's Final Report is modified to state that the parties shall adopt Charter's proposed language.

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[16] *See* Final Arbitrator's Report at § V (Interconnection) at pp. 6 & 8, Case No. T0-2005-0336 (rel. June 21, 2005) (hereinafter *Final Arbitrator's Report).* See *also* In the Matter of Developing a Unified Intercarrier Compensation Regime, *Notice of Proposed Rulemaking,* FCC 01-132 (released April 21, 2001) at ¶ 112 (footnote omitted) (an ILEC "must allow a requesting telecommunications carrier to interconnect at any technically feasible point, including the option to interconnect at a single POI per LATA.")

[17] *See Final Arbitrator's Report* at § V (Interconnection) at p. 3.

C. The CLEC Coalition's Comments:

1. Maintenance and repair of commingled arrangements:

CLEC Coalition UNE Issue 68: (1) Should references to Commingled Elements be included in this Attachment? (2) Should the Attachment include an express obligation for SBC to conform with any performance metrics the Missouri Commission may order during the term of the Agreement?

Discussion:

The Coalition states that the Arbitrator approved the Coalition's proposed language in Sections 1.1 and 3.1, but apparently rejected it in Section 2.1. The Coalition states that this appears to be an inadvertent error that should be corrected in the Commission's order through a clarification of the Final Arbitrator's Report affirming that the CLECs' proposed language is approved for Section 2.1.

Decision:

The language proposed by the Coalition is as follows (the underlined portions are those objected to by SBC):

> 2.1 SBC MISSOURI will provide maintenance for all Unbundled Network Elements Combinations and Commingled Elements ordered under this Agreement at levels equal to the maintenance provided by SBC MISSOURI in serving its end user customers, consistent with Attachment 6 UNE, Section 2.4.1, and will meet the requirements set forth in this Attachment. Such maintenance requirements will include, without limitation, those applicable to testing and net-

work management. The maintenance to support these services will be provided in a manner which meets the performance metrics provided for in Attachment 17 or any MISSOURI Commission-ordered performance measures.

The language proposed by SBC and selected by the Arbitrator is as follows (the language in bold is that objected to by the Coalition):

2.1 SBC MISSOURI will provide maintenance for all Lawful Unbundled Network Elements and Lawful Combinations ordered under this Agreement at levels equal to the maintenance provided by SBC MISSOURI in serving its end user customers, consistent with Attachment 6 UNE, Section 2.4.1, and will meet the requirements set forth in this Attachment. Such maintenance requirements will include, without limitation, those applicable to testing and network management. The maintenance to support these services will be provided in a manner which meets the performance metrics provided for in Attachment 17.

Having considered the foregoing, the Commission concurs with the Coalition. Its proposed language is consistent with the other decisions made by the Arbitrator and his rejection of it here seems to be an error. The Final Arbitrator's Report is hereby modified and the parties are directed to include the Coalition's proposed version of Section 2.1 in their ICA.

2. Billing for unbundled switching where billing is based on usage.

CLEC Coalition UNE Issue 58: Given the TRRO, should CLEC be allowed to purchase UNE switching in this ICA?

Discussion:

The Coalition explains that the Arbitrator concluded that SBC must provide the 271 checklist items of local switching, local loops and local transport in the parties' ICA, and the decisions in his Report regarding access to databases, AIN and other services associated with unbundled local switching are consistent with that determination. That is, the terms and conditions governing the provision of all the associated services that make CLECs' access to 271 unbundled local switching meaningful will be part of this agreement.

However, the Coalition states, in what appears to be an inadvertent error, the Final Arbitrator's Report rejects the Coalition's language set forth in Section 2.3 of the Appendix Pricing to UNE Attachment 6 that states how SBC will bill CLECs for such unbundled switching when the rates are based on minutes-of-use ("MOU"). The Arbitrator, through his resolution of CLEC Coalition UNE Issue 1, determined Coalition UNE Issue 58 in its favor as well. For this reason, the Coalition states that the disputed language shown below should be retained in the Appendix in order to provide complete terms for the billing of unbundled local switching:

> Where rates will be based on minutes of use (MOU), usage will be accumulated at the end office and are rounded to the next higher minute per monthly billing cycle. In the long term usage will be measured beginning when the facilities are seized (excluding network failures) and

ending when the facilities are released. SBC MISSOURI is currently unable to measure busy/don't answer (by/da), but SBC MISSOURI intends to develop such capability. SBC MISSOURI will provide CLEC not less than 30 days notice when SBC MISSOURI begins to measure by/da. No related true up will occur.

The Coalition urges the Commission to correct this apparent error as a clarification to the Final Arbitrator's Report.

Decision:

The Commission concurs with the Coalition. Its proposed language is consistent with the other decisions made by the Arbitrator and his rejection of it here is an error. The Final Arbitrator's Report is hereby modified and the parties are directed to include the Coalition's proposed version of Section 2.3 in their ICA,

3. Restrictions on equipment used by CLECs:

CLEC Coalition UNE Issue 37: Is a general statement referring to regulatory requirements helpful to understanding?

Discussion:

The Coalition states that a review of the detailed matrix accompanying the Arbitrator's Report revealed that one important issue was not decided. The Coalition requests clarification with respect to the following language proposed by SBC and rejected by the Coalition:

2.35 CLEC will connect equipment and facilities that are compatible with the SBC MISSOURI Unbundled Network Elements and will use Unbundled Network Elements in accordance

with the applicable regulatory standards and requirements referenced in Section 2.20.

In its Brief, SBC states that the Commission should adopt its proposed language (set out above), which requires CLECs to connect equipment and facilities compatible with SBC Missouri's UNEs and to use UNEs in accordance with the applicable regulatory standards referenced in the ICA, because SBC Missouri's position is reasonable in that it can only support equipment that currently exists and is approved for use within SBC Missouri's network, SBC contends that it would be unreasonable to require SBC Missouri to be responsible for installing, provisioning, and maintaining equipment that is not established in its network.[18] Moreover, although the Coalition objects to SBC Missouri's proposal, it provides no competing language.

The Coalition did address this issue in its Brief. However, in its Position Statement, the Coalition objected that SBC's proposed language is "vague" and "general" and "raises more questions than [it] answers." For example, the Coalition asks rhetorically, "What is meant by compatible? What is meant by use in this context?" The Coalition states that, if SBC means that CLEC's equipment will meet FCC rules or industry requirements set by testing organizations, then it agrees that that is what should be here. Otherwise, the Coalition asserts, SBC's language only creates confusion for the reader without adding anything concrete and potentially allows SBC to declare some equipment or facility that a CLEC has connected, or is using, to be violating the parties'

[18] Hatch Direct, p. 42.

agreement. The Coalition requests that the Commission rule on this disputed issue.

Decision:

The Commission concurs with SBC and thus modifies the Final Arbitrator's Report to direct the parties to include SBC's Section 2.35 in their ICA. The Commission does not find the provision to be either vague or confusing and is of the opinion that it is indeed reasonable as argued by SBC.

4. Rates:

(A) Rate Increases for Rural UNE Loops:

CLEC Coalition Pricing issue A 1: What are the appropriate cost-based rates for the elements in dispute between the Parties?

Discussion:

The Coalition states that the Arbitrator rejected the CLEC Coalition's proposal that the ICA maintain the UNE rates the parties have been operating under during the term of the M2A. The CLEC Coalition urges the Commission to reconsider this decision because it is contrary to Commission precedent and because approval of SBC's unsupported rate increases will have a very deleterious effect on competition in Missouri, particularly with regard to 2-wire analog (DS0)[19] voice-grade loops in Zones 2 and 3 in rural Missouri ("Rural UNE Loops").

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[19] DSO voice-grade loops were not declassified as UNEs under § 251 in any U.S. market by the FCC's *TRRO* rulings. DSO loops remain a fundamental building block that CLECs using their own switches need to reach residential and small business customers. Therefore, under governing law, DSO loops, whether in rural or urban zones, must be offered at TELRIC rates.

The Coalition points out that, in this arbitration, SBC did not present cost studies justifying any rate changes, much less rate increases for Rural UNE Loops. SBC states that it will no longer offer current prices because they are the result of its M2A "voluntary" commitments. As the following chart taken from the Coalition's Comments demonstrates, the impact of SBC's proposals is particularly evident in the rural rates where prices will increase by 11% in Zone 2 and 69% in Zone 3.

Retail Rate Group	UNE Rate Zone	# of access lines	Rates under Arb. Decision	Current M2A Rates	% Increase
D	1	> than 230,000	$12.71	$12.71	0%
B	2	5,000-59,999	$20.71	$18.64	11%
A	3	0-4,999	$33.29	$19.74	69%
C	4	60,000-229,000	$18.23	$16.41	11%

SBC claims that these much higher rates meet TELRIC standards because they were approved by the Commission in cost proceedings conducted just after the passage of the 1996 Act.

The Coalition states that, in a prior case, the Commission faced the question of whether to apply M2A UNE rates in the place of rates based on similarly-outdated SBC cost studies. In a 2001 AT&T arbitration that occurred after the M2A was in place, SBC urged that the Commission apply pre-M2A rates based on outdated cost studies that were of "1996

vintage."[20] The Commission contrasted the outdated rates proposed by SBC with the M2A rates, which were "the product of a lengthy proceeding and close scrutiny."[21] The Commission concluded that it was appropriate to apply M2A rates in the AT&T-SBC agreement, although they had not been litigated in the parties' arbitration proceeding. The Commission expressed confidence in the M2A rates as being "compliant with both the Act and the FCC's regulations," and noted that the Commission "has already determined that [the M2A] complies with all of the standards applicable to interconnection agreements, including the 14-point checklist in Section 271:[22] Given the absence of current cost studies filed by either SBC or AT&T, the Commission adopted the M2A rates.

Similarly, the Coalition points out, in this case SBC has not presented cost support for departing from the M2A rates. While SBC claims certain rates were "voluntary," SBC ignores the FCC's findings in the Missouri 271 proceeding. The FCC there held that rates such as the Rural UNE Loop rates had to be reduced in order for SBC to attain interLATA long distance entry. As this Commission noted in the AT&T-SBC arbitration order cited above, the FCC was troubled by the fact that "[r]ecurring charges in Missouri are two to six times those in Texas, Kansas,

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[20] *In the Matter of the Application of AT&T Communications of the Southwest, Inc., TCG St. Louis, Inc. and TCG Kansas City, Inc., for Compulsory Arbitration of Unresolved Issues With Southwestern Bell Telephone Company pursuant to Section 252(b) of the Telecommunications Act of 1996*, Case No. TO-2001-455 (*Arbitration Order*, issued June 14, 2001) at 14.

[21] *Id.*

[22] *Id.*

and Oklahoma."[23] When SBC sought long distance authority, it lowered the rates to the current levels. Now, SBC is seeking to raise the same rates back to the levels the FCC found unreasonable, without presenting updated cost support to show that the rates are compliant with TELRIC standards. The Coalition urges the Commission to follow its precedent and reject SBC's unsupported changes to the M2A rates.

The Coalition further states that, if the Commission is reluctant to maintain the *status quo,* the Coalition urges the Commission to reconsider the Arbitrator's ruling approving price increases specifically for the Rural UNE Loop rate, At the current M2A rural prices, Missouri CLECs like Big River Communications and Socket Telecom have been able to offer facilities-based alternatives to Missouri residential and small business customers. CLECs have installed their own switches, connected them to Rural UNE Loops to reach residential and business customers, and thereby made competitive alternatives available to rural customers who otherwise would not have choices for their telecommunications services. Without the availability of affordable voice-grade UNE loops, such service offerings simply are not financially viable.

The Coalition contends that SBC offered the M2A Rural UNE Loop rates as part of its effort to enter the Missouri interLATA long distance market, an effort that required SBC to demonstrate that the Missouri local exchange market was irreversibly open to competition. However, the Coalition points out, now that SBC is not only dominating the Missouri interLATA market, but is on the verge of absorbing its

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[23] *Id.* at 11.

largest competitor AT&T, SBC is moving to raise the UNE rates that have made limited local competition possible for rural residents in Missouri. The Coalition argues that SBC should, at a minimum, be held to the commitment it made in the M2A, which has yielded tangible results for rural areas in Missouri.

Decision:

In its Brief, SBC stated that its proposed rates are generally those contained in prior arbitrations or the M2A, but modified (1) to eliminate "certain voluntary offerings made in the M2A that are not required under the Act," (2) to remove certain elements that have been declassified by the FCC in its TRO and *TRRO* decisions since the M2A was adopted, and (3) to add rates for certain services which were not part of the M2A but which were negotiated by the parties. Nowhere in this discussion did SBC candidly advise the Arbitrator of the size or effect of the rate changes it proposed. Indeed, the scale and impact of these rate changes has only become apparent with the filing of the Coalition's Comments containing the chart reproduced above.

The Commission will modify the Final Arbitrator's Report and direct the parties to use the M2A rates in their ICA. As the Coalition correctly argues, SBC has utterly failed to support these rate increases with current cost studies. In the absence of such studies and an adequate opportunity to review them, this Commission will not approve rate increases.

(B) Interim Rates for Section 271 UNEs:

CLEC Coalition Pricing Issue A 2: Should those elements declassified by the FCC be contained in a 251 Pricing Schedule?

CLEC Coalition Pricing Issue A 3: Should the Pricing Schedule be limited to network elements classified as UNEs under Sections 251 and 252?

Discussion:

The Coalition states that the Final Arbitrator's Report correctly held that unbundled elements required by the § 271 competitive checklist ("§ 271 UNEs") must be included in the M2A successor interconnection agreements. The Coalition further states that the Arbitrator also properly held that the pricing standard for § 271 UNEs is a "just and reasonable" standard rather than a TELRIC standard. However, until the Commission determines what constitutes a "just and reasonable" rate for § 271 UNEs, the industry will need an interim rate for checklist items that are no longer available at TELRIC rates due to declassification under the *TRRO,* that is, switching, loop, and transport elements that have been declassified under § 251 but remain available under the new price standard under § 271.

The CLEC Coalition's proposed contract language contemplated that the interim rates be established at TELRIC levels until the Commission can set a permanent rate. The Arbitrator rejected this proposal, apparently finding it inconsistent with the recommendation that all § 271 UNEs be priced at "just and reasonable" rather than TELRIC rates.[24] The Arbitrator also rejected SBC's proposed language, which did not include any rate for § 271 UN Es.

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[24] Final Arbitrator's Report, Attachment 111.A, Part 1, Detailed Language Decision Matrix, CC UNE Issue 1, proposed Section 1.2.6 (Coalition) and 2.18.6.2 (SBC).

The Coalition sponsored an interim rate compromise proposal in testimony that was not reflected in the Final Arbitrator's Report. In rebuttal testimony, Ms. Mulvany Henry of Birch Telecom testified on behalf of the Coalition:

> Specifically, we ask the Commission to clearly recognize that the only difference between § 271 and § 251 elements . . . is the applicable price. Although SBC is not required to charge TELRIC-based rates, it is also not permitted to charge rates that exceed just and reasonable levels. The arbiter of the appropriate price remains the Missouri Public Service Commission. Because there is no information to establish such rates in this phase of the proceeding, we recommend that the Commission adopt the transitional rates adopted by the FCC as interim § 271 rates until it can arbitrate this issue in the next phase of the proceeding. . . . Section 1.2.6 as proposed by the Coalition provides for these network elements to be priced at TELRIC rates until the Commission sets new "just and reasonable" rates. The Coalition concurs in my recommendation that the Commission adopt the transitional rates on an interim basis.[25]

The Coalition contends that this proposal recognizes that the rate for § 271 UNEs will be higher than current TELRIC rates. It adopts, strictly on an interim basis, the higher transitional UNE prices that the FCC adopted for declassified § 251 UNEs, If the transitional rates adopted by the FCC are adopted, it will provide the parties a rate at

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[25] Mulvaney Henry UNEs Rebuttal, at 21-22 and n.38 (emphasis supplied).

which § 271 UN Es may be purchased via the ICA while permanent just and reasonable rates are being determined.[26]

Rather than leave the parties no guidance on the appropriate interim § 271 UNE rate to be included in the M2A successor ICAs, the Coalition urges that the Commission adopt the compromise proposal the Coalition offered in record testimony and in its post-hearing brief. Adoption of an interim rate will provide certainty and encourage SBC and the CLECs to expeditiously engage in negotiations toward establishing permanent rates for § 271 UNEs. Unless an interim rate is established and CLECs can actually purchase § 271 UNEs out of their ICAs, SBC's obligation to offer § 271 UNEs under the M2A successor agreements will be illusory. This is certainly not the outcome contemplated by the Final Arbitrator's Report.

Decision:

The Arbitrator's decision with respect to both CLEC Coalition Pricing Issues A-2 and A-3 was that "The Arbitrator agrees that the ICA must include prices for § 271 UNEs." However, the Arbitrator failed to specify what those rates would be. SBC of-

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[26] The Coalition's interim rate proposal was also discussed in the Coalition's post-hearing brief: "[T]he CLEC Coalition interim rate proposal for switching, and all other network elements 'delisted' under the *TRRO* is the higher rate approved for the *TRRO* Transition Period by the FCC. If the Coalition proposal is accepted in its entirety, rates for § 271 checklist switching will increase and will stay at that level until the parties agree to a § 271 'just and reasonable' rate or the Commission approves an arbitrated § 271 rate." CLEC Coalition Post-Hearing Brief, at 37 (referencing Ms. Mulvany Henry's testimony).

fered no rates because its view is that these ICAs should not contain prices for § 271 UNEs. Likewise, the Coalition's original suggestion that TELRIC rates be continued is not appropriate given that the appropriate standard is now "just and reasonable." However, the Commission concurs that the Coalition's compromise position — rates patterned on the FCC's transition period rates for declassified UNEs — constitutes a suitable interim rate structure for § 271 UNEs. The Final Arbitrator's Report is so modified and the parties are directed to use such rates in their ICAs.

5. Types of Section 251(b)(5)/ IntraLATA Toll Traffic:

CLEC Coalition NIA Issue 5: (a) Should a non-251 (b) or (c) service such as Transit Service be negotiated separately? (b) If not, is it appropriate to include transit traffic in the definition of Section 251(b)(5)/IntraLATA Toll Traffic?

CLEC Coalition NIA Issue 6: Should terms and conditions relating to Section 251(a) Interconnection be addressed in a separate out-of-exchange appendix.?

Discussion:

The Coalition states that it proposed the following language, which the Arbitrator approved twice[27] and rejected once[28] in the Detailed Language Decision Matrix:

"Section 251(b)(5)/IntraLATA Toll Traffic" shall mean for purposes of this Attachment, (i) Section

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[27] *See* Attachment Transit. A, CC MA 5a and 5b and Attachment V.A. Part 2, CC NIA 5.

[28] *See* Section XIV.A, OE-LEC issues, CC NIA 6.

251(b)(5) Traffic, (ii) ISP-Bound Traffic, (iii) *Optional EAS traffic, (iv) FX or virtual FX traffic (that may also fall under (i), (ii), or (iii)), (v1 Transit Traffic*, (vi) out of area traffic, (iii) IntraLATA Toll Traffic originating from an end user obtaining local dialtone from CLEC where CLEC is both the Section 251(b)(5) Traffic and intraLATA toll provider, and/or (iv) IntraLATA Toll Traffic originating from an end user obtaining local dialtone from SBC-MISSOURI where SBC-MISSOURI is both the Section 251(b)(5) Traffic and intraLATA toll provider.

The Coalition explains that the single rejection of the Coalition's language in the OE-LEC Decision Matrix appears to reject the reference to out-of-area traffic in the same way that the Arbitrator rejects SBC's proposed OE-LEC Attachment. The Coalition supports the Arbitrator's decision that the separate OE-LEC attachment is not required, but the reference to out-of-area traffic should remain in the definition of Section 251(b)(5)/IntraLATA Toll Traffic. The fact that the Coalition members do not support SBC's OE-LEC document does not change the fact that out-of-area traffic will continue to be exchanged between the parties under the ICA and is properly included in the definition.

In its Brief, SBC Missouri asserted that its statutory obligations to offer most Sections 251/252 services is limited to those areas in which it is the incumbent LEC and that the ICA thus does not cover services offered when the parties wish to exchange traffic in the areas where SBC Missouri is not the incumbent LEC, SBC Missouri does not believe it is appropriate to address Out-Of-Exchange-LEC ("OE-LEC") traffic in the interconnection appendix because

the interconnection appendix applies only to SBC Missouri's incumbent territory. It therefore offered CLECs the OE-LEC appendix to govern this type of Out of Exchange traffic.[29]

Decision:

The Arbitrator rejected SBC's argument that its interconnection obligation is limited to its incumbent territory and also rejected SBC's proposed OE-LEC Appendix. However, the Commission concurs with the Coalition here because the fact is that the parties will continue to exchange out-of-area traffic. Its definition is thus appropriately included in the ICA and the Final Arbitrator's Report is so modified.

6. The Metropolitan Calling Area:

CLEC Coalition NIA Issue 2: Is a "Metropolitan Calling Area" considered a "Local Calling Area?"

Discussion:

SBC states that "MCA Traffic" is traffic exchanged throughout the "Metropolitan Calling Area", a calling scope plan established by Public Service Commission Orders in Case No. TO-92-306 and Case No. TO-99-483. Calls within an MCA are rated as "local" to an end-user and the call is § 251(b)(5) Traffic based on the calling scope of the originating party pursuant to the MCA Orders. Either party providing MCA service shall offer the full calling scope prescribed in Case No. T0-92-306 without regard to the identity of the called party's local service provider. For compensation purposes, MCA Traffic shall be exchanged on a bill-and-keep, intercompany compensation basis as provided in the Intercarrier Compensation Appendix.

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[29] McPhee Direct, p. 65-66.

SBC Missouri states that it does not object to the MCA as defined by the Commission, nor the rating of traffic to an end-user, nor the inter-company compensation due for traffic within the MCA. However, an "MCA" is *not* the same as a "Local Calling Area" for a very important reason. A "Local Calling Area", for purposes of this Agreement and Attachment, is limited to those areas in which SBC Missouri is the incumbent local exchange provider. Should a CLEC wish to operate outside SBC Missouri's incumbent territory — even when the territory is within the same MCA — the terms of such OE-LEC traffic must be established. Consequently, there is a very real difference between an MCA and a Local Calling Area and SBC Missouri proposes that the definition of Local Calling Area in the ICA should reflect this distinction.

The Coalition states that its proposed language only addresses those situations in which a CLEC is providing service in an MCA. SBC's proposed language has the effect of requiring a CLEC to establish a POI within SBC's network even if the CLEC only offers service in another incumbent LEC's territory within the LATA but competes with SBC in another LATA.

The Coalition states that, in previous cases concerning the MCA, the Commission defined MCA calls as local calls, ruled that inter-company compensation must be bill-andkeep between companies, and that the calling scope and dialing pattern did not vary based upon the identity of the called party's local service provider. It is simply a Local Calling Area that involves multiple LECs. The present M2A agreement specifically states, For purposes of interconnection and inter-company compensation, "Exchange Area"

shall be defined consistent with SWBT's Missouri Retail Tariffs, except that the entirety of a Metropolitan Calling Area shall be considered a single Exchange Area." The M2A also includes provisions that prohibited Transit Charges from being applied to MCA traffic.

Decision:

The Arbitrator failed to address this issue. The Commission determines that the parties' ICA shall treat this issue in the same manner as did the M2A.

7. PSTN-IP-PSTN And IP-PSTN Issues:

CLEC Coalition ITR Issue 5a: What is the proper routing, treatment, and compensation for Switched Access Traffic including, without limitation, any PSTN-IP-PSTN Traffic and IP-PSTN Traffic?

CLEC Coalition IC Issue 15a: Should reciprocal compensation arrangements apply to Information Services traffic, including IP Enabled Services Traffic?

CLEC Coalition IC Issue 15b: What is the proper routing, treatment, and compensation for Switched Access Traffic including, without limitation, any PSTN-IP-PSTN Traffic and IP-PSTN Traffic?

Discussion:

The Coalition states that the "PSTN-IP-PSTN" and "IP-PSTN" issues relate to intercarrier compensation for traffic that traverses both the traditional "Public Switched Telephone Network" ("PSTN") as well as advanced networks based on "Internet Protocol" ("IP"). The Coalition urged that the Arbitrator not accept SBC's contract proposal on the Coalition issues listed above related to PSTN-IP-PSTN and IP-PSTN traffic, but the Arbitrator nonetheless did accept

SBC's language. The Coalition requests clarification on one part of the Arbitrator's ruling on these issues, that dealing with IP-PSTN traffic compensation.

The Arbitrator ruled in favor of SBC's proposed contract language that would subject both PSTN-IP-PSTN traffic and IP-PSTN traffic to switched access charges in all circumstances. The Coalition understands that the Arbitrator based the decision regarding switched access compensation for PSTN-IP-PSTN traffic on the FCC's order in the AT&T "Phone to Phone" petition. The FCC addressed compensation for a specific form of interstate interexchange traffic in the AT&T "Phone-to-Phone" IP order.[30] The AT&T IP Order was specifically limited to the type of service offered by AT&T and the FCC stressed that it was not attempting to resolve compensation for IP-PSTN traffic in its ruling. As the Arbitrator recognized, several additional issues related to compensation for IP-enabled traffic are being addressed in the pending IP-enabled services rulemaking.[31]

In the ruling on the intercarrier compensation issue designated "MCIm RC 15," the Arbitrator also addressed compensation for IP-PSTN traffic.[32] On that issue, the Arbitrator ruled in favor of MCI's proposal. MCI argued that, unlike PSTN-IP-PSTN traffic, "IP-PSTN traffic, on the other hand falls squarely within the 'net-protocol change' portion of the FCC's multi-part enhanced service definition and is there-

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[30] *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges,* WC Docket No. 02-361, Order (rel. April 21, 2004) *("AT&T IP Order").*

[31] *See In the Matter of IP-Enabled Services,* WC Docket 04-36, Notice of Proposed Rulemaking (rel. March 10, 2004).

[32] Final Arbitrator's Report, Section VI, — pp 21-22.

fore appropriately charged at reciprocal compensation rates instead of switched access rates."[33]

The Coalition requests clarification because the ruling on the Coalition's issue involving IP-PSTN compensation approved SBC-proposed language that would apply switched access to IP-PSTN traffic. The ruling on the MCI issue, however, identifies reciprocal compensation "instead of switched access" as the appropriate compensation mechanism for IP-PSTN traffic. If reciprocal compensation is to be applied to such traffic in the MCI-SBC ICA, it should be applied to the ICA approved for companies in the CLEC Coalition as well. While the Coalition would prefer, as discussed in our testimony and post-hearing brief, that the Commission defer a decision on IP-PSTN compensation until the FCC has definitively ruled, if the Commission chooses to address the issue here, it should addressed in a consistent manner.

Decision:

As asserted by the Coalition, the Arbitrator held with respect to MCI RC Issue 15 that "Mlle IP-PSTN traffic, on the other hand falls squarely within the 'net-protocol change' portion of the FCC's multi-part enhanced service definition and is therefore appropriately charged at reciprocal compensation rates instead of switched access rates." The Commission agrees that this traffic should be treated consistently and the Final Arbitrator's Report is thus modified to provide that the Coalition's ICA will also provide that IP-PSTN traffic be charged under the reciprocal compensation regime rather than be subject to access charges.

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[33] *Id.* at 22.

8. Should the terms, conditions and price of interconnection facilities be included in the ICA or should the ICA refer to SBC's access tariff?

CLEC Coalition E-911 Issue 3: The language in the ITR addresses only 911 trunk interconnections. There is no language specific to 911 in the NIM.

Discussion:

The Coalition states that the Arbitrator agreed with SBC that the "Coalition's proposed language incorrectly mixes the concepts of facilities and trunking. Section 2.3.2 of the E-911 Attachment merely states that SBC will provide the facilities required to establish the interconnection to the SBC 911 selective routers 'as specified in the State access tariff.'" The Coalition contends that the Arbitrator erred on this issue by failing to determine that the interconnection facilities that enable the CLEC to provide 911 service to its customers are interconnection facilities as set forth in §§ 251(a) and (c) of the Act that must be made available at cost-based rates. Consequently, interconnection facilities upon which 911 trunks ride must be available at cost-based rates.

In its testimony and during the hearing, the Coalition states that SBC contended that 911 trunks are ancillary trunks and that 911 traffic is not the mutual exchange of telecom-m unications.[34] SBC opined that, because 911 is not actual interconnection of two

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[34] Hamiter Direct, at 67 and Tr. at 429-30: But for the purpose of whose end users are benefiting from this, you know, we see that your meet point trunk groups, your 911 trunk groups, et cetera are solely for the benefit of your customers, you know, they're really not going to interconnect with us over those trunk groups."

carriers for the exchange of traffic, CLECs should purchase facilities from the access tariff rather than at cost-based prices. The Coalition asserts that SBC is wrong at both the state and federal levels because 911 services are part of local service and 911 facilities are used to interconnect the parties' networks. At the state level, Missouri statutes and rules include 911 service as part of basic local telecommunications service.[35] SBC also provides Universal Emergency Number Services (9-1-1) to 911 entities as a local service via its General Exchange Tariff, P.S.C. Mo. No. 35. 911 entities purchase these services for the ability to receive emergency calls from all telecommunications customers, regardless of which company provides telecommunications services to that customer. At the federal level, the FCC addressed 911 interconnection in a recent Order requiring VoIP providers to provide 911 service to their customers.

We note that the Commission currently requires LECs to provide access to 911 databases and interconnection to 911 facilities to all telecommunications carriers, pursuant to sections 251(a) and (c) and section

[35] Section 386,020(4)(c), RSMo Supp. 2004.

> 271(c)(2)(B)(vii) of the Act. We expect that this would include all the elements necessary for telecommunications carriers to provide 911/E911 solutions that are consistent with the requirements of this Order, including NENA's 12 or wireless E911-like solutions.[1]

Contrary to SBC's assertions, 911 facilities are interconnection facilities under both state and federal law and CLECs are therefore entitled to lease 911 facilities at cost-based rates.

The Coalition further states that an additional problem arises with the Arbitrator's approval of a state access tariff as the source for pricing of interconnection facilities. SBC's intrastate access tariffs are an insufficient source from which to purchase facilities for the provision of all 911 services in Missouri. For example, the selective router that provides service to more than thirty counties in Western and Central Missouri is located in Kansas City, Kansas. CLECs providing service to Missouri exchanges served by the Kansas router may not order from SBC's intrastate special access tariff to obtain facilities to the selective router located in Kansas. Unbundled network elements and interconnection facilities, however, may be purchased from SBC on an interstate basis, which would allow Missouri CLECs to obtain facilities to access the Kansas selective router to serve Missouri customers.

The Coalition points out that the Arbitrator seemed generally reluctant to make any change to

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[1] WC Docket No. 04-36, WC Docket No, 05-196 In the Matters of IP-Enabled Services E911 Requirements for IP-Enabled Service Providers, First Report and Order and Notice of Proposed Rulemaking at ¶ 38 (footnote omitted).

the current M2A 911 process.[2] However, requiring that CLECs purchase 911 facilities from SBC's State access tariff is a change from the current M2A that CLECs believe will result in substantially higher costs and possible pass-through of costs to the PSAPs. Under the M2A, the current $85.00 per DSO rate specified in Attachment E-911MO (M2A) includes both the trunk and the facility charge. Under the Arbitrator's ruling, CLECs must continue to pay this existing rate as a trunk charge plus purchase underlying facilities under the access tariff. This is therefore a major departure from the current process in the M2A.

Under the published rates in SBC's intrastate special access tariff, the rate for the transport facility will be minimum of $450 per month, even when the CLEC is located in the same central office as the selective router and needs nothing more than a cross-connect. Even worse, if the competitive classification provisions contained in pending state legislation that is expected to take effect in August are found to apply to special access, SBC will be free to set these rates at whatever level it chooses. Although no CLEC has tariffed charges for providing 911 service to PSAPs, the Coalition contends that the specter of unrestricted SBC prices and of no alternative providers for facilities to SBC's selective routers may cause CLECs to pass through increased 911 facility charges to the state's PSAPs.

Decision:

The Coalition did not bother to address this issue in its Brief or in testimony. The only assistance it offered the Arbitrator on this point was the following

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[2] See, e.g., Final Arbitrator's Report, Section IX at 3.

Position Statement: "The interconnection Agreement itself is a better place for the parties to have reliable, consistent references for information. Tariff information is subject to change with little notice." Consequently, the Arbitrator was unable to foresee the significant adverse economic impact that would result from the position he adopted.

The Commission is of the opinion that the Arbitrator was right to be reluctant to depart from the M2A. The Commission considers that that is also the right answer to this issue. The Final Arbitration Report is modified to require that the parties' ICA incorporate the language of the M2A on this point.

D. MCI's Comments:

1. Entrance facilities:

MCI NIM Issue 13: Should facilities used for 251(c)(2) interconnection be priced at TELRIC rates?

SBC's Statement of the Issue: Should a non-section 251/252 service such as Leased Facilities be arbitrated in this section 251/252 proceeding?

Discussion:

MCI states that the Final Arbitrator's Report is inconsistent in that the Arbitrator ruled that "entrance facilities are part of SBC Missouri's network. To the extent CLECs desire to obtain interconnection facilities described above, they may do so at cost-based (TELRIC) rates."[3] However, the attached Detailed Language Decision Matrix states that "MCI's language is not consistent with the Arbitrator's Report."[4]

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[3] Final Arbitrator's Report, Section V, page 16.

[4] Attachment V, Part 1, Detailed Language Decision Matrix,

MCI states that the decision column of that matrix should reflect that MCI's proposed language is most consistent with the Arbitrator's Report.

Decision:

The Commission concurs with MCI. The Detailed Matrix does not accurately reflect the Arbitrator's decision, The Commission will therefore modify the Arbitrator's Final Report and direct the parties to adopt MCI's proposed language.

E. Navigator's Comments:

1. Who should bear any costs arising from assignments, mergers, name changes, and the like?

Navigator GTC Issue 6: Should CLEC be responsible for the cost associated with changing their records in SBC's systems when CLECs enter into an assignment, transfer, merger or any other corporate change?

Discussion:

Navigator contends that the Arbitrator overlooked its GTC Issue No. 6, set out above. The Arbitrator listed this DP under his GT&C Issue 3(b).

Navigator states that the Arbitrator noted that it raised the issue of charges imposed by SBC for changing OCN/ACNA information. As noted by the Arbitrator, Navigator does not object to compensating SBC for those functions, but does object to SBC's practice of imposing a separate charge for each resale line while imposing only a single charge for an entire block of UNE lines. The Arbitrator quoted Navigator witness LeDoux: "As a substantial number of our

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page 57.

lines are resale, this practice could have a substantial impact on Navigator. We simply believe that SBC should impose the same block charges for both UNE and resale lines."[5]

The Arbitrator found that SBC may impose a reasonable charge for database corrections, but he did not address the issue raised by Navigator, that is, disparate charges for UNE and resale lines,[6] Navigator states that it does not seek a "free ride," that is, the right to demand that SBC impose no charge for performing these functions. Rather, Navigator asks the Commission to find that the charges be imposed in a nondiscriminatory fashion.

Although SBC addressed, in its post-hearing brief, the issue of requiring CLECs to pay for costs incurred in changes of CLEC company identifiers, SBC did not address Navigator's discriminatory charges issue.[7] Navigator contends that SBC provided no testimony to justify this practice. For this reason, Navigator urges the Commission to find that its language, which would eliminate the practice, should be incorporated into the ICA.

SBC's position is that the CLECs must be responsible for the costs associated with any assignments, transfers, mergers, acquisitions, or other corporate changes.[8] ACNAs and OCNs, which are assigned by industry agencies such as Telcordia and NECA, appear on each end user account and circuit. These

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[5] Report, Section 1(A), p. 22.

[6] Report, Section 1(A), p. 23.

[7] SBC's Brief, pp. 13-15.

[8] SBC's Statement of Position, Navigator's GT&C DPL, issue 6.

codes are used in all ILECs' directory databases, network databases (LMOS, TIRKS, INAC, RCMAC, etc.), and billing systems to identify inventory and appropriately bill the services provisioned on each service order. Any change to a company code requires service order activity on each and every end user account and circuit in order to update the multitude of systems. Not only are these company codes utilized within the ILEC but also throughout the industry in such databases as the LERG, which allows the industry as a whole to properly bill routed calls. When a company code change is associated with a transfer of assets, it is no different than a CLEC-to-CLEC migration that requires a service order to be submitted by a winning Carrier.

Decision:

Navigator's proposed language states: "For resale or any other products not billed in CABS, to the extent a record order is available, a record order charge will apply per Resale BAN,"[9] while SBC's proposed language states: "For resale or any other products not billed in CABS, to the extent a record order is available, a record order charge will apply per end user record." The difference lies only in the final words of this sentence.

SBC's witness, Suzette Quate, testified: "To implement an OCN/ACNA change for a CLEC, SBC Missouri must, at the CLEC's direction, update the accounts of each of the CLEC's end users in the SBC Missouri databases to reflect the correct company name, OCN/ACNA, or other CLEC company identifier."[10] Navigator's witness, LeDoux, testified in turn:

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[9] 'BAN' means Billing Account Number.

[10] Quate Direct, pp. 10-11.

"SBC imposes a single charge for changing the Billing Accounts Number (BAN) for UNE lines billed in CABS, but imposes a per-line charge for resale lines. We believe that this is discriminatory, and there is no business reason to justify this practice."[11]

It appears from the testimony that every resale line end-user account must be modified in the event of an OCN/ACNA change, while the testimony is silent as to UNE lines. Navigator, however, does not challenge the treatment of UNE lines, it challenges the per-line charge levied on resale lines. The record shows that SBC incurs per-line costs for resale lines because each end-user record must be changed. For this reason, the Commission concludes that SBC's language is preferable. The parties are directed to incorporate SBC's proposed language in their ICA.

2. Escrow deposits:

Navigator GT&C Issue 10: Which party's language regarding grounds for termination for non-payment should be included in this agreement?

Naviqator/SBC MO GT&C 11(b): Should the GT&Cs contain specific guidelines for the method of conducting business transactions pertaining to the rendering of bills, the remittance of payments and disputes arising thereunder? Is it appropriate to require Party's to escrow disputed amounts?

Discussion:

Navigator states that the Final Arbitration Report is inconsistent in that the Arbitrator sided with Navigator on its GT&C Issue 11, finding that CLECs need not escrow disputed amounts while pursuing

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[11] LeDoux Rebuttal, p. 4.

the dispute resolution process, but agreed with SBC on Navigator's GT&C Issue 10, ruling that SBC could force Navigator to pay disputed amounts into escrow under pain of complete termination of all services. Navigator urges the Commission to resolve this inconsistency by finding that Navigator's proposal for GT&C Issue 10 should be adopted.

Decision:

The Commission agrees that the Final Arbitration Report is inconsistent as alleged by Navigator. However, none of the proposed language is appropriate in view of the Arbitrator's decision that disputed amounts need not be escrowed. SBC's proposed language, adopted by the Arbitrator, states:

> 14.2.4 if the nonpaying party is required to deposit Disputed Amounts into an interest bearing escrow account, it must provide written evidence that it has established an interest bearing escrow account that complies with all the terms set forth in Section 9.4 and deposited a sum equal to the Disputed Amounts [other than disputed charges arising from Appendix Reciprocal Compensation] into that account. Until evidence that the full amount of the Disputed Charges [other than disputed charges arising from Appendix Reciprocal Compensation] has been deposited into an escrow account that complies with Section 9.4 is furnished to the Billing Party, such Unpaid Charges will not be deemed to be "disputed" under Section 10.

Navigator's proposed language states:

> 14.2.4 if the nonpaying party is required to deposit Disputed Amounts into an interest bearing escrow account, it must provide written evidence

that it has established an interest bearing escrow account that complies with all the terms set forth in Section 9.4 and deposited a sum equal to the Disputed Amounts [other than disputed charges arising from Appendix Reciprocal Compensation] into that account.

The Commission will modify the Final Arbitration Report to reflect that neither party's Section 14.2.4 shall be incorporated into their ICA.

F. Sprint's Comments:

1. Unresolved GT&C Issues Number 4, 5, 7 and 13:

Sprint GT&C Issue 4: Should Sprint be required to have an out of exchange appendix when CLEC is seeking Section 251(a) interconnection with SBC so that CLEC may serve exchanges which are not in SBC's incumbent exchange areas?

Sprint GT&C Issue 5: Should this appendix utilize the term LEC or Telecommunications Carrier?

Sprint GT&C Issue 7: Should the ICA contain a specific definition for Transit Traffic?

Sprint GT&C Issue 13: (a) Should SBC be allowed to require CLEC to use a specific form for submitting billing disputes? (b) Should SBC be obligated to review all CLEC billing disputes if the disputed amount is not placed in escrow?

Discussion:

Sprint states that these disputed issues were properly resolved by the Arbitrator in favor of Sprint, Therefore, Sprint states, the Commission should order that Sprint's position be adopted and that Sprint's proposed language pertaining to these issues

be included in the ICA; SBC's proposed language that was disputed by Sprint should be rejected.

Decision:

Sprint's GT&C Issue 7 was listed and resolved in Sprint's favor in Section 1(C).1 of the Final Arbitrator's Report. Sprint's GT&C Issue 13 was listed and resolved in Sprint's favor in Section I(A).4(e) — Issue 13(a) — and Section I(A).4(d) —Issue 13(b). The parties shall incorporate Sprint's proposed language in their ICA and the Final Arbitrator's Report is modified to the extent that it is inconsistent. Sprint's GT&C Issues 4 and 5 were omitted from the Final Arbitrator's Report. However, Sprint's ITR Issue 8 is identical to its GT&C Issue 4 and was decided in Sprint's favor at Section XV.1 of the Final Arbitrator's Report. The Report is modified to include Sprint's GT&C Issue 4 at Section XV, 1 and the parties are directed to adopt Sprint's language in their ICA.

Sprint did not list its GT&C Issue 5 in its Brief as an issue still requiring a decision by the Arbitrator. This fact explains its absence from the Arbitrator's Report, but does not explain its presence in Sprint's Comments. Having advised the Arbitrator that the point was settled, it is odd that Sprint now requests relief from the Commission.

The disputed language concerns the definition of "routing point." SBC's proposed language states (the contested language appears in bold):

> 1.1.99 "Routing Point" is a location which a LEC has designated on its own network as the homing or routing point for traffic inbound to Exchange Service provided by the LEC which bears a certain NPA-NXX designation. The Routing Point is

> employed to calculate mileage measurements for the distance-sensitive transport element charges of Switched Access services. The Routing Point need not be the same as the Rating Point, nor must it be located within the Rate Center area, but must be in the same LATA as the NPA-NXX.

Sprint's proposed language states:

> 1.1.99 "Routing Point" is a location which a Telecommunications Carrier has designated on its own network as the homing or routing point for traffic inbound to Telecommunication Service provided by the Telecommunications Carrier which bears a certain NPA-NXX designation. The Routing Point is employed to calculate mileage measurements for the distance-sensitive transport element charges of Switched Access services. The Routing Point need not be the same as the Rating Point, nor must it be located within the Rate Center area, but must be in the same LATA as the NPA-NXX.

SBC stated in its Brief that the Commission should adopt SBC Missouri's proposed language, which utilizes the term "Local Exchange Carrier" ("LEC") as defined in the Act because this term excludes persons who provide services other than telephone exchange or exchange access services, particularly, commercial mobile radio service ("CMRS").[12] SBC states that Sprint's proposal, to use the term "Telecommunications Carrier," is "an attempt to combine Sprint's non-251 wireless traffic into this ICA which is improper as this is a Section 251/252 ICA under which UNEs are offered and the provision of such UNEs is

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[12] McPhee Direct, pp. 27 (footnote 12) and 71-72.

limited to LECs, to the exclusion of certain other services, including CMRS providers."[13]

Sprint's position is that the definition of "routing point" should not be not limited to LECs because LERG and industry standards allow for all telecommunications carriers to specify routing points for their numbers.

Having considered the foregoing, the Commission determines that SBC's proposed language should be adopted. In an agreement between two LECs, it is immaterial that other, uninvolved carriers also may have routing points. The Arbitrator's Report is so modified and the parties are directed to incorporate SBC's language in their ICA.

2.Should each party be financially responsible for the facilities on its side of the POI?

Sprint FR Issue 6: Should each party be financially responsible for the facilities on its side of the POI?

Discussion:

Sprint states that, on pages 9-10 of the Final Arbitrator's Report pertaining to Interconnection, the Arbitrator erroneously suggests the adoption of SBC's proposed language on this issue. Sprint contends that the SBC language logically contradicts the Arbitrator's rulings on other interconnection issues in this arbitration and that the Sprint language should be adopted instead. In addition, Sprint has found additional authority from another jurisdiction supporting its position on this issue.

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[13] SBC's Brief, pp. 61-62; McPhee Direct, p. 72.

Sprint states that the Arbitrator's ruling on ITR Issue 6 on cost sharing for the interconnection facilities is not logically consistent with his rulings on other related interconnection issues. The first sentence of the rationale on page 10 of the Arbitrator's Report on Interconnection states that: "Each Party is financially responsible for facilities on its side of the POI." The Arbitrator also ruled on page 6 of the report that a CLEC must establish a POI within SBC's network, and indeed, Sprint agreed with SBC on this issue. If both of these rulings are adopted by the Commission as proposed by the Arbitrator, it seems Sprint would be forced to absorb 100% of the cost of the transport facility that physically joins Sprint's network with SBC's network since this interconnection facility resides on Sprint's side of the POI.

However, the conclusion above is undercut by the second sentence of the Arbitrator's rationale on page 10 of the Arbitrator's Report on Interconnection. There, the Arbitrator states: "A Party that agrees to carry traffic that originated on or transited its network to the terminating carrier's nearest tandem may require the other Party to reciprocate." This sentence clearly indicates that when Sprint carries its originating traffic to SBC's tandem, Sprint may require SBC to "reciprocate" and deliver SBC's originating traffic to Sprint's tandem or switch, resulting in both parties being financially responsible for the transport costs necessary to deliver its originated traffic to the terminating carrier's switch, This shared-cost concept can be implemented in a few ways. Both parties may establish one-way trunks to deliver the traffic onto the terminating party's network or the parties may establish shared, two-way facilities that carry traffic originated by both parties. if shared, two-way facilities are established, Sprint

contends that the law, logic and fairness dictate that the cost of this facility must be shared by both parties. It is not acceptable to require Sprint to absorb 100% of the cost of a transport facility that carries both parties' originating traffic. The Commission should reconcile this conflict by adopting the Sprint language proposed for ITR Issue 6 and ruling that the cost of a two-way interconnection facility should be shared.

The FCC rules require each party to assume the costs associated with its originating traffic. Specially, 47 C.F.R. 51.709(b) states "the rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of the trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network." In addition, 47 C.F.R. 51.703(b) states that "a LEC may not assess charges on any other telecom carrier for telecom traffic that originates on the LEC's network." These two FCC rules make clear that the FCC's intent is not for Sprint to be burdened with 100% of transport costs relating to interconnection facilities used to carry both parties' originating traffic even though that facility is physically located on Sprint's side of the POI.

Sprint states that the Maryland Commission agreed with this Sprint position and decided this issue between AT&T and Verizon.[14] Specifically, the Maryland Commission stated that:

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[14] See In the Matter of the Petition of AT&T Communications of Maryland, Inc. Pursuant to 47 U.S.C. 252(b) Concerning Interconnection Rates, Terms and Conditions (Order No. 79250), Case No. 8882 (Public Serv. Comm. of Maryland, July 7, 2004).

> Each Party is responsible for the cost of delivering its traffic through its network and into the interconnection facility that connects the two networks. The cost of the interconnection facility itself is shared consistent with the rules set for by the FCC in paragraph 1062 of 1996 First Report and Order. In sum, those rules require that the carriers share the cost of the interconnection facility based upon each carrier's percentage of the traffic passing over the facility.[15]

Furthermore, the Maryland Commission states that:

> Each carrier is responsible for the cost of transporting its traffic through its network. Both carriers then equitably share the cost of the interconnection facility which connects the two networks, based on each carrier's share of the traffic that passes over the interconnection facility.[16]

Finally, Sprint points out that SBC's position in this docket is notably inconsistent with the interconnection arrangements it has with other carriers, including the interconnection arrangement it has with Sprint PCS as well as the arrangement it has with its own affiliate, Cingular. SBC finds the FCC rules applicable in a wireless context and will acknowledge a responsibility to share interconnection facility costs with CMRS carriers, yet SBC claims without basis that those same FCC rules do no apply to interconnection arrangements with CLECs.

Sprint asks that the Commission find that SBC must share the cost of the interconnection facility

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[15] id., pp. 9-10.

[16] id., p. 10.

that physically links the Sprint network with the SBC network and not allow SBC to burden Sprint with 100% of the cost. Sprint's proposed language requires that the cost be shared 50%150% by both Parties assuming an equal balance of traffic. Sprint would also accept contract language that allows for cost sharing to be based on a proportionate use of the facility — language which is acceptable to SBC when negotiating and interconnecting with CMRS carriers and its own affiliate.

Decision:

The Arbitrator ruled as follows:

> Each Party is financially responsible for facilities on its side of the P01. A Party that agrees to carry traffic that originated on or transited its network to the terminating carrier's nearest tandem may require the other Party to reciprocate. Any language pertaining to reciprocal compensation will be addressed in that portion of the agreement.

In its Brief, SBC stated that Section 252(c) and the FCC's implementing rules in the TRO and TRRO imply that each party should be solely responsible for its facilities on its side of the P01. Moreover, the Commission has previously approved interconnection agreements wherein the two parties have agreed that "CLEC will be responsible for engineering and maintaining its network on its side of the Physical P01. Sprint will be responsible for engineering and maintaining its side of the Physical P01."[17] No different result should follow here.[18]

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[17] See, Case No. IK-2005-0152, Order Approving Interconnection Agreement (between Sprint and Intermedia Communica-

Sprint states in its Brief that the FCC defines § 251 interconnection as "the physical linking of two networks for the mutual exchange of traffic."[19] The transmission facility that physically links the two networks is the interconnection facility and it is a shared-cost responsibility of the two interconnected networks, The FCC interconnection rules clearly establish that the cost of the transmission facility is a shared-cost responsibility of the two carriers whose networks are being interconnected. First, 47 C.F.R. 51.709(b) states:

> [T]he rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two, carriers' networks shall recover only the costs of the proportion of the trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network.

Second, 47 C. F. R. 51.703(b) states that "a LEC may not assess charges on any other telecom carrier for telecom traffic that originates on the LEC's network."

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tions, Inc.), January 28, 2005 (Interconnection Agreement, Part F, at pp. 40-41); Case No, IK-2005-0151, Order Approving Interconnection Agreement (between Sprint and FamilyTel of Missouri, LLC), January 28, 2005 (Interconnection Agreement, Part F, at p. 55).

[18]Moreover, Charter's witness stated that "contrary to Mr. Land's testimony, in a fiber meet arrangement, wherever that fiber does meet becomes the POI, and I think it has to be given the responsibilities of each party on their side of the P01." Tr. 685.

[19] In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98. 95-185, First Report and Order, FCC 96-325, (August 8, 1996), ¶ 176 (Local Competition Order).

Together, these rules dictate that both carriers bear a cost responsibility for the interconnection facility because each party is using the interconnection facility to deliver traffic to the other party.

The Commission concurs with the Arbitrator's finding that, in general, each party is solely responsible for the facilities on its side of the POI. Nonetheless, the Commission agrees with Sprint that each party must be financially responsible for its own outgoing traffic. Where the interconnection is via a two-way trunk, the cost of that facility must necessarily be shared. The Arbitrator's Report is modified accordingly and the parties are directed to adopt Sprints proposed language.

3. Should non-251(b) or (c) services such as Transit Services be negotiated separately?

Sprint 1C Issue 7; Should non 251(b) or (c) services such as Transit Services be negotiated separately?

Discussion and Decision:

Sprint's IC Issue 7 was listed at Section I(C).1 of the Final Arbitrator's Report, but the description of the issue given there was evidently incorrect. Nonetheless, the Arbitrator did determine AT&T Network A-C 11 Issue 4(c), CLEC Coalition IC Issue 1, ITR Issue 4, and NIA Issue 5(a), and MCI RC Issue 18 in that section, all of which are identical to Sprint's 1C Issue 7. Sprint is thus correct. The Arbitrator's Report is modified accordingly and the parties are directed to adopt Sprint's proposed language set out below:

17.2.1 Transit service providers are rightly due compensation for the use of their tandem switch-

ing and common transport elements when providing a transit service. This compensation is based on TELR1C pricing and appears in Appendix PRICING.— All Traffic.

4. Future declassifications:

SPRINT UNE 3: Should changes in SBC MISSOURI'S unbundling obligation due to lawful action be incorporated into the terms and conditions pursuant to the change in law provisions in the agreements General Terms and Conditions?

Discussion:

Sprint states that there are important technical errors in the Arbitrator's decision matrix regarding UNE Issue 3 that appear to have caused a substantive error as well. The Commission should correct the technical error and adopt all Sprint's proposed language for Issue 3 while rejecting all SBC's proposed language that is disputed by Sprint.

The technical error begins on page 124-6 of the Arbitrator's UNE decision matrix, Attachment Ill. A. Part 1, where the Arbitrator ruled on proposed contract section 8.4.2. The Sprint language that appears on page 125 next to SBC's section 8.4.3 should actually be added to the end of Sprint's proposed Section 8.4.2 that appears in the Arbitrator's decision matrix and also in the joint DPL filed by the parties. The effect of splitting Sprint's proposed language for section 8.4.2 into two pieces in the Sprint column of the decision matrix is to throw off the alignment of the Sprint proposed language in the remainder of the Arbitrator's decision matrix. For instance, Sprint's proposed section 8.4.3 should be lined up with SBC's proposed section 8.4.3. Sprint's proposed section 8.4.3.1 gets pushed down the matrix and is improperly lined up

with SBC's proposed 8.4.4 instead of SBC's proposed 8.4.3.1. Again, this should be remedied by tacking the language on page 125, which begins "If Sprint does not dispute the declassification" to the end of Sprint's section 8.4.2, and then realigning the remaining contract sections.

This misalignment may have inadvertently thrown off the Arbitrator's analysis and created a substantive error as well that the Commission needs to correct. The error creeps in where the Arbitrator rules on section 13,5.2.1 on page 128 of the decision matrix. The Arbitrator states that Sprint's language is not consistent with the Arbitrator's report, but Sprint believes this is inaccurate and likely an inadvertent mistake by the Arbitrator because he was comparing Sprint's proposed language for 8.4.4 to SBC's 13.5.2.1. However, Sprint's terms for section 13.5,2.1 (DS1 Dedicated Transport) are essentially identical to Sprint's terms at 13.5.3.1 (DS3 Dedicated Transport) and 14.11.1 (Dark Fiber Dedicated Transport), which the Arbitrator found entirely consistent with his recommendation. Accordingly, Sprint believes that all of its proposed language is consistent with the law and also the Arbitrator's report and should be adopted by the Commission. The conclusion that Sprint's language should be adopted for 13.5.2.1 is further bolstered by the Arbitrator's ruling for Sprint language on almost every other UNE issue. Sprint urges the Commission to adopt Sprint's proposed language in its entirety for the reasons argued in its brief and supported in its testimony.

Decision:

The Commission concurs with Sprint that the Arbitrator's Report contains technical and substantive errors as Sprint describes. The Report is modified ac-

cordingly and the parties are directed to adopt Sprint's language for Section 13.5.2.1.

G. WilTel's Comments:

1. Indemnification and Limitation of Liability:

WilTel GT&C Issue 12: Is it reasonable for SBC to seek to limit its liability if it violates the law?

Discussion and Decision:

WilTel complains that, although the Arbitrator found for WilTel in his discussion and decision on this issue,[20] the Detailed Matrix states incorrectly that SBC's language is most consistent with the Report.[21] SBC's language states that ". . . each Party's liability . . . whether in contract, tort or otherwise, including alleged breaches of this Agreement and causes of action alleged to arise from allegations that breach of this Agreement also constitute a violation of a statute, including the Act . . . shall not exceed in total the amount . . ." (emphasis added). WilTel's language, on the other hand, states that ". . . each Party's liability . . . whether in contract, tort or otherwise, including alleged breaches of this Agreement, but excluding causes of action alleged to arise from allegations that breach of this Agreement also constitute a violation of a statute, including the Act . . . shall not exceed in total the amount . . ." (emphasis added). WilTel contends that its language is clearly most consistent with the Report and, therefore, the DLM incorrectly implements the Arbitrator's findings and conclusions in the Report. WilTel requests that

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[20] See Report, Section 1(A), at 69.

[21] Attachment I.A., at 207.

the Commission correct the DLM and order that WilTel's proposed language be adopted.

Decision:

The Arbitrator ruled as follows (emphasis added):

[F]irst, that it is improper for this ICA to attempt to limit or alter damages available under a statute. Second, the Arbitrator concludes that it is contrary to public policy to cap liability for intentional, willful or grossly negligent conduct. Third, the Arbitrator concludes that liability and indemnity provisions should be reciprocal and symmetrical.

The Commission agrees with WilTel that its language more closely reflects the Arbitrator's decision. The parties are directed to adopt WilTel's language; to the extent that it is inconsistent, the Arbitrator's Report is modified accordingly.

2. Compliance audits:

WILTEL UNE Issue 18: Which party's auditing language for compliance with the FCC's eligibility is more reasonable and in compliance with FCC rules?

SBC's Statement of the Issue: What guidelines are appropriate for auditing of SBC's eligibility criteria?

Discussion:

WilTel's UNE Issue 18 deals with SBC's auditing rights and obligations pertaining to the eligibility criteria established by the FCC for access to enhanced extended links ("EELs"). WilTel complains that the Arbitrator's ruling on the audit issues stated only that "[t]o the extent that these issues relate to SBC Missouri's auditing functions concerning the eligibil-

ity criteria, SBC Missouri's proposed language is reasonable."[22] The Commission's rules require a "reasoned articulation of the basis for the decision on each issue, including how the decision meets the standards set in sections 251 and 252 of the Act."[23] WilTel evidently believes that the Arbitrator's Report does not meet that standard with respect to this issue. Further, WilTel complains, many elements of SBC's proposed language are contrary to FCC rules as established in its TRO.[24]

The FCC addressed the rights and obligations pertaining to an ILEC's right to audit a CLEC's compliance with the FCC-mandated eligibility criteria set forth in FCC Rule 51.318(b).[25] Among other things, the FCC mandated that ILECs "should have a limited right" to audit compliance with the service eligibility criteria.[26] The language approved in the Report, however, provides SBC a virtually unlimited right to audit because of SBC's all-encompassing "in addition

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[22] Report, Section III, at 39-40.

[23] Commission Rule 4 CSR 240-36.040(19).

[24] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17145, 278 (2003), corrected by Errata, 18 FCC Rcd 19020 (2003), vacated and remanded in part, affirmed in part, United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004) cert. denied, 125 S.Ct. 313, 316, 345 (2004) (hereafter referred to as the "TRO").

[25] See TRO at 625-629.

[26] TRO at ¶ 625.

to any other rights" phrase.[27] Additionally, SBC's language in Section 2.18.7.4 of the Agreement (see DML Attachment 111.B. Part 3, at 80) imposes a 100% compliance standard for the audit which is contrary to the FCC's rules which state clearly that "the concept of materiality governs this type of audit."[28] Finally, SBC's language would allow it to seek payment at wholesale rates even during any time period when WilTel was in fact in compliance with eligibility criteria, which is clearly contrary to the FCC's Rules and § 251 of the Act requiring SBC to provide access to UNEs at rates that are reasonable and nondiscriminatory.

SBC's proposed audit language goes beyond what is permitted by law in accordance with the FCC's rules and should not have been approved in the Report. WilTel's proposed language, on the other hand, is consistent with the FCC's rulings in the TRO. WilTel requests that the Commission approve its language over SBC's language on this UNE Issue 18.

Decision:

In its Brief on this issue, SBC stated that the Commission should adopt its proposed language, related to audits for compliance with the service eligibility criteria, because it: (1) more closely tracks the TRO on audits, including the costs thereof; and (2) provides increased certainty on how audits are to be conducted and what is to be done with the results.[29] The FCC permits annual audits of EELs and high-cap commingled arrangements. The Commission

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[27] See DML Attachment 111.B. Part 3, at 79 (Section 2.18.7 of language).

[28] TRO at ¶ 626, and n. 1905.

[29] Silver Direct, pp. 87-88.

should reject WilTel's proposed language because it improperly limits SBC Missouri's right to be compensated for WilTel's failure to meet the eligibility criteria for the period beginning on the first date of non-compliance of the non-compliant circuit rather than the date that the non-compliant circuit was established, By including this language, SBC Missouri would not be compensated for WilTel's non-compliance in situations where WilTel disconnected service or converted to a wholesale service.

The Commission has reviewed the parties' arguments and cited authorities and concludes that the Arbitrator's decision was correct. The Commission declines to modify the Report on this point.

H. SBC's Comments:

1. Changes in UNE offerings:

CLEC Coalition GT&C Issue 24: Should SBC MISSOURI be allowed to make changes in its UNE offerings that disrupt provisioning to CLEC without advance notice or written approval of CLEC?

Discussion:

SBC states that the Commission should reverse the Arbitrator's decision with respect to CLEC Coalition GT&C Issue 25 because the parties did not present an issue 25 to the Arbitrator for resolution. As such, SBC asserts, "the decision is arbitrary, capricious, and unlawful in that it is beyond the scope of his authority under the Act and 4 CSR 240-36.040." SBC further contends that, to the extent that the Arbitrator may have meant to refer to CC GT&C 24, the Commission should reverse the Arbitrator's decision as it is "arbitrary and capricious, against the weight of the competent and substantial evidence, and is

unlawful for the reasons set forth in Section III [UNEs]."

Decision:

SBC contends that the Arbitrator's decision must be reversed because he referred to a DP by the wrong number. A review of the CLEC Coalition's GT&C DPL reveals what appears to be two issues 24 on successive pages. This is the second of those; perhaps the Arbitrator though the parties had misnumbered the DP. In any event, this scrivener's error does not require reversal or even correction — clearly, SBC is able to identify the DP in question.

SBC does not assert any substantive grounds for reversal except a general and unhelpful reference to " the reasons set forth in Section III." The Commission will not winnow through Section III of SBC's Comments in an effort to find support for its position. For these reasons, the Commission declines to modify the Arbitrator's Report.

2. Arbitrator's Section 15: Provision of Service to End-Users:

Navigator GT&C ISSUE 15: Whether to include language allowing end users to take services from SBC upon end user request?

Discussion:

SBC Missouri states that it seeks clarification with respect to this issue. Specifically, in the Final Arbitrator's Report, the Arbitrator states that he: "generally agrees with Navigator. Services offered by SBC to 'win back' Navigator's subscribers are subject to retail tariff rates, terms and conditions so far as ap-

plicable."[30] However, in the Arbitrator's Detailed Language Decision Matrix, the Arbitrator states that Navigator's language, which would require SBC Missouri to offer service to win back customers at the rates found in its retail tariff, is "most consistent with Arbitrator's Report." Since retail tariffs are not always applicable, Navigator's proposed language is inconsistent with the Final Arbitrator's Report. Thus, SBC Missouri seeks a modification, reflected in bold, to Navigator's proposed language as follows:

> CLEC acknowledges that SBC MISSOURI may, upon End User request, provide services directly to such End User similar to those offered to CLEC under this Agreement at the rates found it its retail tariff to the extent that the service is offered pursued to a retail tariff.

Decision:

The Commission agrees with SBC that the Detailed Matrix is inconsistent with the Arbitrator's decision. The Arbitrator's Report is modified accordingly and the parties are directed to adopt SBC's proposed language as set out above.

3. Arbitrator's Section 23: Accessible Letters:

> Navigator GT&C Issue 12: Should the Interconnection Agreement incorporate the nondiscriminatory and commonly used Accessible Letter process as a form of communication between SBC Missouri and Navigator?

Discussion:

SBC Missouri states that it seeks clarification with respect to the above-referenced issue, While SBC

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[30] See Arbitrator's Final Report, Section 1(A), p. 77,

Missouri agrees that it is simply incorrect that the Accessible Letter process is used to unilaterally change, revise, supersede, amend, modify or otherwise alter the provisions of the ICA, as the Arbitrator acknowledges with respect to Arbitrator's Section 2(b), Accessible Letters are also used to provide notice of tariff changes.[31] Thus, SBC Missouri contends that Navigator's proposed language should be modified by the language provided in bold:

> The parties acknowledge that the Accessible Letter Notification process in no way authorizes SBC Missouri to unilaterally change, revise, supersede, amend, modify or otherwise alter the provisions of this agreement except provisions regarding services offered via tariff.

Decision:

At Section I(A).2.(b) of his Report, the Arbitrator held:

> The Arbitrator agrees with SBC that any tariff provision or tariff rate incorporated into the ICA should automatically be updated as the referenced tariff is changed. As SBC points out, that is the reason that the ICA references certain tariffs. The Arbitrator further determines that the quid pro quo for such automatic incorporation is prior notice to the CLECs via the Accessible Letters process. The Arbitrator agrees with Charter, however, that SBC cannot use tariff modifications to alter the terms of the parties' ICA. The ICA always trumps contrary tariff provisions, Where a CLEC orders under a tariff rather than

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[31] Arbitrator's Final Report, Section 1(a), p. 14.

under the ICA, however, the CLEC is then stuck with the tariff.

Thus, the modification sought here by SBC accords precisely with the Arbitrator's cited ruling and will be granted. The Arbitrator's Report is modified accordingly and the parties are directed to adopt SBC's proposed language as set out above.

4. GT&C Issues that It Appears The Arbitrator Failed to Address:

(a) What is the proper scope of SBC's obligations under the ICA?

Should the ICA refer to "network elements" or "UNEs"?

CLEC Coalition GT&C Issue 2: (a) [Whereas clause and § 1.1 & 1.2] Should the reference to "network element" be maintained in the ICA, as distinguished from "unbundled network elements"?

SBC's Statement of the Issue: Should the Interconnection Agreement obligate SBC to provide UNEs, collocation and resale services outside SBC Missouri's incumbent local exchange area?

Discussion and Decision:

SBC contends that the Arbitrator neglected to determine these DPs. If so, the Arbitrator addressed DPs identical to SBC's above at Section I(A).1.(b) of his Report as well as in Section III thereof. The Arbitrator determined that SBC's obligation to interconnect is not bounded by its ILEC service area, while its obligation to provide access to UNEs is so limited. To the extent that SBC offers services outside of its ILEC service territory, its resale obligations also extend outside of its service territory.

Likewise, the Arbitrator addressed the terminology issue raised by the CLEC Coalition at Section III.A.1.a.i of his Report, although he did not specifically address CLEC Coalition GT&C Issue 2(a) there or elsewhere. The Commission concludes that the Coalition's proposed language best expresses the Arbitrator's decision and the parties are directed to incorporate that language. The Arbitrator's Report is hereby modified accordingly.

(b) Force Majeure language:

Navigator GT&C Issue 13: Should SBC's additional sentence be included in the Force Majeure language in this Agreement?

Discussion and Decision:

Although the parties have generally agreed upon Force Majeure language which should be included in this ICA, the parties were unable to resolve this issue in its entirety and the Arbitrator did not address it. The area of disagreement is whether timely payments of invoiced amounts should be required during a Force Majeure event. In an effort to settle this issue, SBC Missouri proposed the following language, which is also set forth in the SBC Missouri Preliminary Issue Column of the Navigator/SBC Missouri DPL:

> Except as otherwise specifically provided in this Agreement, neither Party will be liable for any delay or failure in performance of any part of this Agreement caused by a Force majeure condition, including acts of the United States of America or any state, territory, or political subdivision thereof, acts of God or a public enemy, fires, floods, labor disputes such as strikes and lock-

outs, freight embargoes, earthquakes, volcanic actions, wars, civil disturbances, cable cuts, or other causes beyond the reasonable control of the Party claiming excusable delay or other failure to perform. Provided, Force Majeure will not include acts of any Governmental Authority relating to environmental, health, or safety conditions at work locations. If any Force Majeure conditions occurs the Party whose performance fails or is delayed because of such Force Majeure conditions will give prompt notice to the other Party, whereupon such Party's obligation or performance shall be suspended to the extent that the Party is affected by such Force Majeure Event. The other Party shall likewise be excused from performance of its obligations to the extent such Party's obligations relate to the performance so interfered with. Upon cessation of such Force Majeure condition, the Party whose performance fails or is delayed because of such Force Majeure conditions will give like notice and commence performance hereunder as promptly as reasonable practicable.

The Commission will adopt this language because it strikes a balance between the parties' interests by providing that if one party's performance is excused by a force majeure event, the other party need not perform its contractual obligations with respect to the item that is not provided during the time of the force majeure event.

5. Arbitrator's Final Report, Section 1(a), p. 14or's Section 111(4): EELs Eligibility.

CLEC Coalition UNE Issue 9: How should the parties incorporate the mandatory eligibility criteria applicable to certain combinations of hi-cap loops and transport (EELs)? (e) Does SBC's example assist the reader in understanding the restrictions on EELs contained in the TRO?

CLEC Coalition UNE Issue 15: How should EELs be defined in the ICA in light of the TRRO?

Discussion:

SBC states that the Arbitrator's Report does not specifically address the language in Sections 2.20.2.2.6 and 2.20.2.2.7 of the Coalition's proposed language. Nevertheless, the Detailed Language Decision Matrix states that the CLEC Coalition language is consistent with the Arbitrator's Report. SBC Missouri seeks clarification that this is in error and that the Arbitrator's Final Report governs here. SBC Missouri notes that its language was noted as consistent with the Final Report in most sections of this issue and the wording of the Detailed Decision Matrix appears to be in error. This conclusion is further buttressed by page 27 of the Detailed Language Decision Matrix which expressly notes that SBC Missouri's proposed language in 2.20.2.2.7 is consistent with the order. Accordingly, SBC Missouri requests clarification that its proposed language is to be used here.

If it is not intended that SBC Missouri's language be used here, then SBC Missouri requests the Commission to overturn the Arbitrator's decision on the basis that it is unlawful and not supported by substantial and competent evidence. The Coalition's use of "loop" in 2.20.2.2,6, and of "EEL loop" in 2.20.22.7 is confusing, not defined, and might be argued to limit the application of the FCC's 51.318(b) criteria applicable to high-capacity EELs and commingled ar-

rangements. The FCC Rule implemented by 2.20.2.2.6 uses the phrase "24 DS1 enhanced extended links or other facilities" (51.318(b)(2)(vi)), but the CC's language says "24 DS1 EELs loop or the other facilities". SBC Missouri's proposed language follows the FCC Rule exactly in referencing "24 DS1 EELs or other facilities" and should be adopted. Similarly, in 2.20.2.2.7, the FCC Rule says "Each circuit" (51.318(b)(2)(vii), SBC Missouri's proposed language properly states "Each circuit" but the CC language uses the phrase "Each EEL loop circuit". No explanation is given for the insertion of "loop" other than Coalition's language, but the insertion (i) is contrary to the FCC's Rule 51.318(b) and the TRO; (ii) can only create confusion and, particularly with respect to 2.20.2.2.7, possible erroneous claims that this criteria only applies to EELs when FCC 51.318(b) expressly applies to both high-cap EELs and commingled arrangements; and (iii) is arbitrary and capricious, and not supported by the record. Accordingly, the inclusion of "loop" should be stricken from 2.20.2.2.6 and "EEL loop" stricken from 2.20.2.2.7.

Decision:

The language proposed by the Coalition is as follows (portions objected to by SBC are underlined):

> 2.20.2.2.6 For each 24 DS1 EELs loop, or the other facilities having equivalent capacity, CLEC will have at least one active DS1 local service interconnection trunk for the exchange of local traffic. CLEC is not required to associate the individual EEL collocation termination point with a local interconnection trunk in the same wire center.

2.20.2.2.7 Switching: Each EEL loop circuit to be provided to each customer will be served by switching equipment that is, a switch capable of switching local voice traffic.

The language proposed by SBC is as follows (portions objected to by the Coalition are in bold):

2.20.2.2.6 For each 24 DS1 EELs or other facilities having equivalent capacity, CLEC will have at least one active DS1 local service interconnection trunk that meets the requirements of Section 2.20.4 of this Attachment; and

2.20.2.2.7 Each circuit to be provided to each End User will be served by a switch capable of providing local voice traffic.

By way of example only, the application of the foregoing conditions means that a wholesale or retail DS1 or higher service/circuit (whether intrastate or interstate in nature or jurisdiction) comprised, in whole or in part, of a UNE local loop-Unbundled Dedicated Transport(s)-UNE local loop (with or without multiplexing) cannot qualify for at least the reason that the UNE local loop-Unbundled Dedicated Transport combination included within that service/circuit does not terminate to a collocation arrangement. Accordingly, SBC MISSOURI shall not be required to provide, and shall not provide, any UNE combination of a UNE local loop and Unbundled Dedicated Transport at DS1 or higher (whether as a UNE combination by themselves, with a network element possessed by CLEC, or pursuant to Commingling, or whether as a new arrangement or from a conversion of an existing service/circuit) that does not terminate to a colloca-

tion arrangement that meets the requirements of Section 2.18.3 of this Appendix Lawful UNE. Section 2.18.2 shall apply in any arrangement that includes more than one of the UNEs, facilities, or services set forth in that Section, including, without limitation, to any arrangement where one or more UNEs, facilities, or services not set forth in Section 2.18.2 is also included or otherwise used in that arrangement (whether as part of a UNE combination, Commingled Arrangement, or otherwise), and irrespective of the placement or sequence of them.

The Commission determines that SBC's language is most appropriate, except that the Commission finds the lengthy example at Section 2.20.2.2.7 to be unnecessary. The Report is modified accordingly and the parties are directed to adopt SBC's language as here modified.

6. Arbitrator's Section III(G)(8)(d): Navigator UNE 9:

Navigator UNE Issue 9: Which Party's language accurately describes the party in control of the inside wire on the End User's side of the NID?

Discussion and Decision:

The Commission agrees with SBC that clarification is necessary here. The Final Arbitrator's Report states that "SBC Missouri's language is accepted."[32] The Detailed Language Decision Matrix, however, indicates that Navigator's language is "most consistent". The Commission modifies the Arbitrator's Re-

[32] Arbitrator's Final Report, p.69.

port to consistently provide that SBC's language is to be adopted. The parties are directed to comply.

IT IS THEREFORE ORDERED:

1. That the Final Arbitrator's Report, filed in this case on June 21, 2005, is incorporated into this Order by reference.

2. That the parties shall incorporate the Commission's resolution of each open issue as described in this Order into their interconnection agreements and shall file their interconnection agreements no later than 4:00 p.m. on Wednesday, July 13, 2005.

3. That the Staff of the Missouri Public Service Commission shall file a Memorandum and Recommendation advising the Commission that it has reviewed each such proposed interconnection agreement and determined that it complies with this Order and applicable statutes not later than 4:00 p.m. on Monday, July 18, 2005.

4. That this Order shall be effective on July 11, 2005.

BY THE COMMISSION

/s/Colleen M. Dale Secretary
Colleen M. Dale Secretary

(SEAL)

Davis, Chm., Murray, Gaw, Clayton, and Appling, CC., concur.

Dated at Jefferson City, Missouri, on this 11th day of July, 2005.

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

[Logo]

Case No. TO-2005-0336

Southwestern Bell Telephone, d/b/a SBC Missouri's Petition for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection Agreement to the Missouri 271 Agreement ("M2A").

FINAL ARBITRATOR'S REPORT

Issue Date: June 21, 2005

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Case No. TO-2005-0336

Southwestern Bell Telephone, d/b/a SBC Missouri's Petition for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection Agreement to the Missouri 271 Agreement ("M2A").

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STATEMENT OF FINDINGS AND CONCLUSIONS

1(A). General Terms & Conditions:

1(a). Should the ICA include non-251 provisions?

SBC's Issue Statement: Does the Commission have jurisdiction to arbitrate language which pertains to Section 271 and 272 of the Act and which was not voluntarily negotiated and does not address a 251(b) or (c) obligation?

AT&T GT&C Issue 1(b): Should the Agreement include obligations under Section 271 of the Act or should it on/y cover Section 251?

CLEC Coalition GT&C Issue 1: Shou/d the M2A successor interconnection agreement continue to reflect the commitments SBC made to the Commission and CLECs in order to obtain Section 271 relief?

MC1 GT&C Issue 1: Shou/d the Genera/ Terms & Conditions describe the entire contract as an agreement between the Parties with respect to obligations under Section 251 of the Act?

Sprint GT&C Issue 1(a): Should this Interconnection Agreement contain language that goes beyond SBC's obligation to provide 251/252 services?

WilTel GT&C Issue 4: Does the Commission have the jurisdiction to arbitrate language which pertains to Section 271 and 272 of the Act and which was not voluntarily negotiated and does not address 251(b) or (c) obligation?

Discussion:

SBC's position is that an interconnection agreement made under Sections 251 and 252 of the Act need not reflect those obligations, if any, that Section 271 imposes on RBOCs and that Section 252, which authorizes state commissions to arbitrate interconnection agreements, does not authorize state commissions to impose any Section 271 duties while acting in that capacity.[1] Non-251(b) and (c) items are not subject to arbitration unless both parties voluntarily consent to the negotiation and arbitration of such items. SBC maintains that it has not, and does not, voluntarily consent to negotiate or arbitrate the terms, conditions, and rates for these facilities.

The CLECs generally seek a statement in the "whereas" clauses that acknowledges the process SBC went through to gain its § 271 authority and the market-opening commitments it made at that time. Those commitments were embodied in the M2A and should not be eliminated unless SBC is willing to give up its § 271 relief.

AT&T contends that SBC is attempting to limit its lawful obligations. AT&T suggests, for example, that SBC has proposed broad, vague language that would allow it to refuse to open NPA-NXX codes assigned to

[1] Coserv LLC v. Southwestern Bell Telephone co., 350 F.3d 482 (5th Cir. 2003) ("Coserv").

AT&T in exchanges outside of SBC's franchised territory but within the areas served by SBC's currently-deployed tandem switches. According to SBC, it does not have to do anything to facilitate traffic exchange with AT&T where that traffic originates or terminates outside of SBC's serving territory. The effect of SBC's position, however, is to prevent calls from being completed between SBC's and AT&T's customers. SBC's position directly threatens the ubiquitous phone service that Missouri presently enjoy.

Decision:

This arbitration concerns interconnection agreements ("ICAs") that will replace the now-expired M2A. The M2A, in turn, was SBC's statement of generally-available terms and conditions, offered "[t]o ensure that CLECs have easy access to a contract incorporating SWBT's various § 271 commitments[.]"[2]

On November 20, 1998, SBC notified the Commission that it intended to seek authority from the F.C.C. to provide in-region, interLATA telecommunications services in Missouri under § 271 of the Act. This provision bars RBOCs such as SBC from entering the interLATA long-distance market without prior approval from the F.C.C. That approval is conditioned on its finding that certain statutory measures of competition have been met in the state in question.[3]

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[2] In the Matter of the Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act of 1996, 10 Mo.P.S.C.3d 156 (issued March 15, 2001).

[3] 47 U.S.C. § 271(d)(3).

This Commission held proceedings in Case No. TO-99-227 to determine whether to give a positive recommendation to the F.C.C. pursuant to § 271(d)(2)(B) of the Act. That provision requires the F.C.C. to consult with the state commission "to verify the compliance of the Bell operating company with the requirements of subsection (c)." A positive recommendation could be made only if either (1) the Commission determined that SBC had entered into a binding interconnection agreement with at least one facilities-based competitor, or (2) the Commission approved a statement by SBC of the terms and conditions upon which it generally offered to provide interconnection and access to UNEs.[4] in either case, the interconnection agreement or statement of terms and conditions was required to satisfy the 14-point checklist at § 271(c)(2)(B) of the Act.

To meet the 14-point checklist and thereby secure a favorable recommendation from the Commission, SBC tendered on June 28, 2000, a model interconnection agreement for Commission approval; this agreement was the M2A.[5] The M2A included binding terms for interconnection and for access to UNEs, including UNEs not then combined in SBC's network, and for

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[4] 47 U.S.C. § 271(c)(1), (A) and (B), and § 252(f).

[5] The M2A is SWBT's statement of the terms and conditions upon which it generally offers access and interconnection.

the resale of services.[6] The M2A was modeled upon an agreement negotiated in the course of SBC's § 271 proceeding in Texas, the T2A, which had been approved by the F.C.C.[7] After further modification, the Commission approved the M2A on March 6, 2001, finding that it met the 14-point checklist. Thereafter, the Commission made a favorable recommendation to the F.C.C.

SBC's § 271 application before the F.C.C. was ultimately successful. However, SBC can lose its § 271 authority "[i]f at any time after the approval of an application under paragraph (3), the [F.C.C.] determines that a Bell operating company has ceased to meet any of the conditions required for such approval[.]"[8] One of those conditions is the existence of a statement of generally-available terms and conditions that meets the 14- point checklist at § 271(c)(2)(B) of the Act.

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[6] In the Matter of the Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act, Case No. TO-99-227 (Report & Order, issued March 15, 2001) (hereinafter the "271 Report & Order) at 17-19.

[7] In the Matter of the Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act, Case No. TO-99-227 (Order Finding Compliance with the Requirements of Section 271 of the Telecommunications Act of 1996, issued March 6, 2001) (hereinafter the "271 Compliance Order) at 2.

[8] 47 U.S.C. § 271(d)(6),

For these reasons, the Arbitrator decides in favor of the CLECs and against SBC on this point.

1(b). What is the appropriate scope of SBC's obligations under the ICA?

AT&T GT&C Issue 1(a): Should the Interconnection Agreement obligate SBC to provide interconnection, UNEs, collocation and resale services outside SBC's incumbent local exchange area?

* * *

Charter GT&C Issue 24: Which Party's scope of obligation language should be included in this agreement?

* * *

ICA. In other words, WilTel is attempting to give it the power to pick and choose provisions in subsequent arbitrations even though the FCC has expressly prohibited such activity. Specifically, in the Second Report and Order, the FCC stated:

> Because we find that the current pick-and-choose rule is not compelled by section 252(i) and an all-or-nothing approach better achieves statutory goals, we eliminate the pick-and-choose rule and replace it with an all-or-nothing rule. Under the all-or-nothing rule we adopt here, a requesting carrier may only adopt an effective interconnection agreement in its entirety, taking all rates, terms and conditions of the adopted agreement . . . as of the effective date of the new rule, the pick-and-choose rule will no longer apply to any interconnection agreement.[235]

Decision:

The Arbitrator concurs with SBC. Public policy is best served by the prompt implementation of changes of governing law.

20. Should the ICA refer to Section 251(c)(3) UNEs?

Navigator GT&C Issue 2: Should the ICA contain language that specifies SBC's obligation to provide only section 251(0(3) UNEs even if the term "section 257(c)(3) UNE" is not always referenced in front of Unbundled Network Elements?

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[235] *Second Report and Order, In the Matter of Review of Section 251 Unbundling Obligations of Incumbent* Local *Exchange Carriers,* CC Docket No. 01-338, ¶ 10, released July 13, 2004

Discussion:

SBC states that the Commission should adopt its proposed language, which clarifies that whenever there are references to UNEs that are to be provided by SBC, the parties agree that the ICA only requires the provision of § 251(c)(3) UNEs regardless of whether the term "section 251(c)(3)" is used as a part of the reference to UNES.[236] This language is necessary so that § 251(c)(3) UNEs are distinguished from declassified network elements, which are those that, under FCC and court decisions, are not required to be unbundled under the law governing ICAs under § 252 of the Act.[237] SBC is mindful of its obligations under § 271 of the Act, but such obligations do not require the provision of declassified UNEs in this ICA.

Navigator responds that SBC proposes to insert the word "lawful" in front of the term "UNEs" as a means of unfairly and inappropriately reducing its obligation to provide access to network elements, and to inject uncertainty into the Agreement.[238] Its offer to substitute "Section 251 (c)(3)" for "lawful" does not change the substance of its proposal. SBC's proposed language is particularly inappropriate in light of the extensive litigation that continues to take place over which network elements[239] SBC must provide to

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[236] Silver Direct, p. 10; Silver Rebuttal, p. 4.

[237] Silver Direct, p. 10; Silver Rebuttal, p. 4.

[238] LeDoux Direct, at 4.

[239] In its Brief, Navigator uses the term "UNE" to refer to network elements that SBC is obligated to provide pursuant to the FCC's network unbundling rules and the term "network element" to refer to those to which SBC has no unbundling obligation.

CLECs on an unbundled basis. UNEs are UNEs, and if the FCC or a state commission determines that CLECs are no longer "impaired" without access to a particular network element, SBC must still provide access to the network element, but at "just and reasonable" rates rather than TELRIC-based rates under the ICA.

Navigator states that SBC confuses its obligations to provide access to network elements. Even if it is fairly and rightfully determined that a CLEC is no longer "impaired" without access to a network element, the CLEC should still have access to that network element, just not at TELRIC rates. SBC's proposal ignores its obligation to provide network elements to requesting carriers pursuant to § 271 of the Act[240] or at "just and reasonable rates" under the ICA.[241] Despite the simplicity of this regime, SBC seeks to inject uncertainty into the ICA with its lawful: unlawful dichotomy. SBC's proposed language would give it carte blanche to impose its own unilateral and subjective interpretation of what is required to be provided and should therefore be eliminated throughout the ICA.

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[240] Indeed in the TRO, the FCC reaffirmed its standing conclusion that "BOCs have an independent obligation, under section 271(c)(2)(B), to provide access to certain network elements that are no longer subject to unbundling under section 251, and to do so at just and reasonable rates." *TRO* at 652.

[241] If a CLEC is "impaired" without access to a network element, it should be priced at TELRIC pursuant to § 251(d) standards. If, however, there is a finding of no impairment," CLECs should still have access to the network element, but at just and reasonable rates pursuant to §§ 201 and 202 of the Act.

Navigator asserts that, at minimum, the proposed language will lead to substantial disputes.[242] Under SBC's proposed language, if it unilaterally determines that one of the FCC's "no impairment" thresholds has been met, it would issue an Accessible Letter advising CLECs to issue orders requesting that the UNE be converted to a special access or resale service within thirty days. CLECs taking issue with SBC's determination would have to follow the dispute resolution process under the ICA and contest SBC's determination before the Commission. SBC's proposed language would require CLECs to litigate each time they were denied UNEs or charged a non-TELRIC rate.

Navigator contends that SBC's proposal is inappropriate given the substantial litigation over which UNEs SBC must provide and at what prices.[243] The state regulatory commissions, the FCC, and federal courts have all considered the obligation to provide UNEs in numerous decisions.[244] Navigator asserts that, as evidenced by the extensive litigation, it is clear that SBC will do anything within its means to reduce, if not eliminate, its obligation to provide network elements to CLECs.[245] Under its proposed language, however, SBC would be able to establish its own list of UNEs — based on its own interpretation of relevant law — despite the FCC's, state commissions', and the D.C. Circuit's tireless efforts to settle this long-standing issue.

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[242] LeDoux Direct, at 4.

[243] LeDoux Direct, at 3.

[244] *Id.*

[245] LeDoux Direct, at 3.

Through its proposed contract language, SBC attempts to limit its contractual obligations and inject uncertainty into the ICA.[246] In the event that SBC believes that its statutory obligations to provide UNEs has changed, its proposed contract language would allow it to unilaterally impose its interpretation of its obligations on signatory CLECs.[247] Navigator has expended a great deal of time and resources into negotiating and arbitrating its ICAs with SBC. Having done so, at minimum, the ICA should provide Navigator some degree of certainty as to its contractual obligations with SBC.[248] Under SEC's proposed language, the ICA would do no more than restate SBC's current interpretation of its obligation to provide UNEs.[249]

Navigator contends that SBC's proposed language turns the contract into a guessing-game and does not allow Navigator to properly plan provisioning orders and network deployment plans.[250] SBC's proposed language is a transparent attempt to circumvent network sharing obligations and would allow it to unilaterally impose its interpretation of relevant law on Navigator.[251] SBC's proposed language should therefore be rejected.

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[246] *Id.*

[247] LeDoux Direct, at 4.

[248] LeDoux Direct, at 5.

[249] *Id.*

[250] *Id.*

[251] LeDoux Direct, at 6.

Decision:

The Arbitrator concurs with Navigator for the reasons stated above.

III. Unbundled Network Elements ("UNEs"):

Attached hereto is Appendix III. A. Detailed Language Decision Matrix, which is incorporated as if fully set forth herein.

A. Overarching Issues for Network Elements in New ICAs

1. SBC Missouri's "Lawful UNE" Language/Availability of Section 271 Checklist Network Elements

a. AT&T UNE 1
AT&T UNE 2(b)
CC UNE 1 CC UNE
49 CC UNE
57 CC UNE
60 CC UNE
67 MCIm UNE 2
Navigator UNE 1
Sprint UNE 1
WilTel OE LEC 1(a)
WilTel UNE 1

AT&T UNE 1: Is it appropriate for the term ICA to include the term "lawful" UNE?

SBC MO: (a) Should the ICA obligate SBC Missouri to continue to provide network elements that are no longer required to be provided under applicable law or should the ICA clearly state the SBC Missouri is required to provide only UNEs that it is lawfully obligated to provide under Section 251(c)(3) of the Act.

(b) Has federal law on unbundling preempted state law so that the Commission may not order unbundling of network elements beyond those required by the FCC?

(c) Should the temporary rider be referenced in Attachment 6 when it will ultimately expire in less than 18 months.

AT&T SBC/MO 2(b): Should the Agreement require SBC Missouri to provide UNEs when they are not required under Section 251 of the Act (i.e. when they are arguably required under state law or Section 271)?

CC UNE 1: (a) Section 271 unbundled network elements: Should SBC be required to make available under this interconnection agreement all of the network elements it is required to unbundle under Section 251 and under Section 271?

(b) "Lawful UNEs:" See issue statement for Issue # 2 below.

(c) Pricing of Section 271 network elements: What will be the pricing of network elements that are no longer provided as unbundled network elements under Section 251, but must be made available to CLEC under Section 271?

(d) Declassification and Reclassification of Network Elements under Section 251, and updating wire center classifications: Should the agreement contain a self-executing process for reinstating unbundled network elements that have been "Declassified" by the FCC, if that Declassification is over

turned or if the classification of one or more of SBC's wire centers changes? What process should apply to updating the classification of wire centers? See Sections 1.2.1, 1.2.2 and 1.2.6. This Issue is addressed in Section A.2 below.

(e) UNE combinations during the transition plan: Should the Attachment clearly state that SBC must provide combinations of Section 251 UNEs so long as those Section 251 elements must be made available under the Transition Plan?

SBC MO: Should the ICA obligate SBC to continue to provide network elements that are no longer required to be provided under applicable law or should the ICA clearly state that SBC is required to provide only UNEs that it is lawfully obligated to provide under Section 251(c)(3) of the Act?

(a) How are wire centers (and associated buildings and routes) that meet the FCC's TRO Remand Order criteria to be characterized under this Agreement? This issue is addressed in Section III(B)(1)(c) below.

CC UNE 49: Is inclusion of the term "lawful" as applied to unbundled network elements as SBC has defined that term appropriate since its use permits SBC to unilaterally determine what is or is not a "lawful" network element?

SBC MO: Should the ICA obligate SBC to continue to provide network elements that are no longer required to be provided under applicable law or should the ICA clearly state that SBC is re-

quired to provide only UNEs that it is lawfully obligated to provide under Section 251 (c)(3) of the Act?

CC/SBC MO UNE 57: Should the ICA obligate SBC to continue to provide network elements that are no longer required to be provided under applicable law or should the ICA clearly state that SBC is required to provide only UNEs that it is lawfully obligated to provide under Section 251(c)(3) of the Act?

CC/SBC MO UNE 60: Should the ICA obligate SBC to continue to provide network elements that are no longer required to be provided under applicable law or should the ICA clearly state that SBC is required to provide only UNEs that it is lawfully obligated to provide under Section 251(c)(3) of the Act?

CC/SBC MO UNE 67: Should the ICA obligate SBC to continue to provide network elements that are no longer required to be provided under applicable law or should the ICA clearly state that SBC is required to provide only UNEs that it is lawfully obligated to provide under Section 251(c)(3) of the Act?

MCI/SBC MO UNE 2: Which parties' definition of Lawful UNE should be included in the Agreement?

NAVIGATOR/SBC MO UNE 1: Should the ICA obligate SBC to continue to provide network elements that are no longer required to be provided under applicable law or should the ICA clearly state that SBC is required to provide only UNEs that it is lawfully obligated to provide under Section 251(0(3) of the Act?

What are the appropriate geographic restrictions in which SBC is obligated to provide access to UNEs? This issue is addressed below in AT&T UNE 4.

SPRINT UNE 1: Should SBC MISSOURI agree to provide access to unbundled network elements in accordance with specific references to applicable law?

SBC MO: Should SBC MISSOURI only be required to provide Lawful Unbundled Network Elements in accordance with Federal Law?

WILTEL UNE 1: Should the ICA contain language that would exclude from the ICA's generally applicable change of law provisions any change in SBC's legal obligations to provide access to UNEs and permit SBC to unilaterally alter its legal contractual obligations under the ICA?

SBC MO: Should the ICA obligate SBC to continue to provide network elements that are no longer required to be provided under applicable law or should the ICA clearly state that SBC is required to provide only UNEs that it is lawfully obligated to provide under Section 251(c)(3) of the Act?

i. Use of the Term "Lawful " UNEs

SBC Missouri's proposes to define the term "Lawful UNEs" as follows:

Lawful UNEs Appendix, Sec. 1.2.1: SBC Missouri shall be obligated to provide UNEs only to the extent required by Section 251(c)(3) of the Act, as determined by lawful and effective FCC rules and associated lawful and effective FCC and judicial orders, and may decline to provide

UNEs to the extent that provision of the UNE(s) is not required by Section 251(c)(3) of the Act, as determined by lawful and effective FCC rules and associated lawful and effective FCC and judicial orders. UNEs that SBC Missouri is required to provide pursuant to Section 251(c)(3) of the Act, as determined by lawful and effective FCC rules and associated lawful and effective FCC and judicial orders shall be referred to in this Agreement as "Lawful UNEs."

SBC Missouri asserts that this definition simply restates what is indisputably true under the law, that SBC Missouri is only required to provide unbundled network elements that have lawfully been found to meet the federal standards for unbundling and that the FCC has required to be unbundled in its orders pursuant to section 251(c)(3); and will ensure that SBC Missouri is not agreeing to provide unbundled access or TELRIC-pricing beyond that which is required by federal law. According to SBC Missouri, the term "Lawful UNEs" or "Section 251(c)(3) UNEs" distinguishes such network elements from "declassified" network elements, which are those that, under FCC and court decisions, are not required to be unbundled under governing law. CLECs counter that SBC Missouri's proposed "Lawful UNE" language would permit it to interpret the FCC's orders and court decisions as it sees fit and to its advantage, creating a situation in which the change-of-law provision in the agreement can be bypassed by SBC if on appeal the FCC's TRRO is reversed or remanded. SBC Missouri believes the term "Lawful UNEs" is appropriate, but it is willing to use the term "Section 251(c)(3) UNEs" as long as that term is defined substantively the same as proposed.

Decision:

SBC Missouri may not refer to certain UNEs as "lawful" UNEs. The use of the term Lawful UNEs creates the implication that there are unlawful UNEs, when this is not the case. SBC Missouri may refer to "Section 251(c)(3) UNEs" in order to distinguish them from other kind of UNEs, such as UNEs offered pursuant to agreements SBC Missouri made in order to obtain Section 271 authority. Finally, this definition of either Section 251(c)(3) UNE or Lawful UNE does not actually define a kind of UNE, but merely restates what SBC perceives are its unbundling obligations under current and future law and can be construed to allow circumvention of the change of law provisions found elsewhere in this agreement. This Commission has shown itself willing to modify the change procedure when the FCC promulgates what appear to be self-effecting rules, and can decide quickly whether the change of law provisions must be followed. While SBC Missouri is no longer obligated to provide certain UNE combinations or arrangements involving declassified elements, some obligations remain. The change of law provisions are necessary to allow carriers relying on certain UNEs to provide service to substitute another arrangement without disruption of service to customers. SBC Missouri's statement concerning "lawful" UNEs may not be included in the agreement. To the extent that SBC Missouri is not willing to remove the word "lawful" from its proposed language (and limiting to "Section 251(c)(3) UNEs" is unacceptable as well), SBC Missouri's proposed language will not be accepted. To the extent that decisions within this Arbitrator's Decision accept SBC Missouri's language,

but fail to object to the use of "lawful," it is included as if restated every applicable time therein.

H. Unbundling Obligations under Section 271

47 USC 271 provides that Bell operating companies or their affiliates (including SBC Missouri) may not offer certain interLATA telecommunications services unless they comply with certain requirements set forth in the rule. Of particular relevance to this discussion is the competitive checklist, set forth in §271(c)(2)(B), which requires that access and interconnection offered by the Bell company to include, in addition to those unbundled network elements required under §251(c)(3), unbundled local loop transmission trunk-side local transport and unbundled local switching. These access and interconnection requirements must be made available either pursuant to an approved statement of generally available terms or pursuant to an interconnection agreement approved under §252.

Although it is clear that UN Es offered pursuant to the unbundling obligations set forth in §251(c)(3) must be offered at TELRIC rates, there appears to be no requirement that the same standard must be applied to §271 access and interconnection obligations. In light of the specific inclusion of §§251(c)(2) and (c)(3), the failure to include §271 must mean that the rates charged for those services must be just and reasonable, but need not be TELRIC.

In the TRO (paragraph 659) the FCC noted:

> In interpreting section 271(c)(2)(B), we are guided by the familiar rule of statutory construction that, where possible, provisions of a statute should be read so as not to create a conflict. So if,

for example, pursuant to section 251, competitive entrants are found not to be "impaired" without access to unbundled switching at TELRIC rates, the question becomes whether BOCs are required to provide unbundled switching at TELRIC rates pursuant to section 271(c)(2)(B)(iv). In order to read the provisions so as not to create a conflict, we conclude that section 271 requires BOCs to provide unbundled access to elements not required to be unbundled under section 251, but does not require TELRIC pricing. This interpretation allows us to reconcile the interrelated terms of the Act so that one provision (section 271) does not gratuitously reimpose the very same requirements that another provision (section 251) has eliminated.

Decision:

As SBC Missouri does not have an approved statement of generally available terms through which it meets its §271 access and interconnection obligations, it may only do so through interconnection agreements such as this. Therefore, this agreement shall include both §251(c)(3) and §271 network elements. To the extent that SBC Missouri remains obligated to offer pursuant to §251(c)(3), then prices must be TELRIC. To the extent it must offer pursuant to §271, then prices must be just and reasonable.

b. AT&T UNE 4

CC UNE 4

AT&T/SBC MO UNE 4: Must AT&T meet certain conditions in order to access and use any UNEs?

CC UNE 4: Is SBC obligated to provide access to UNEs in its entire certificated local exchange area without any other geographic restriction?

SBC MO: Must CLEC meet certain conditions in order to access and use any UNEs?

SBC Missouri's proposes to restrict access to UNEs through language that: (1) requires the CLEC to be a telecommunication carrier, consistent with Section 251(c)(3)); (2) requires the CLEC to use Lawful UNEs (or Section 251(c)(3) UNEs) for the provisioning of a telecommunication service, consistent with Section 251(c)(3); (3) requires the CLEC to notify SBC Missouri if the CLEC ceases to be a telecommunications carrier; and (4) restricts the CLECs from using UNEs for wireless and long distance services, consistent with Rule 51.309(b).

47 CFR Part 51.309 provides:

> (a) Except as provided in §51.318, an incumbent LEC shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements for the service a requesting telecommunications carrier seeks to offer.
>
> (b) A requesting telecommunications carrier may not access an unbundled network element for the sole purpose of providing non-qualifying services.
>
> (c) A telecommunications carrier purchasing access to an unbundled network element to provide exchange access services to itself in order to provide interexchange services to subscribers.

(d) A requesting telecommunications carrier that accesses and uses an unbundled network element pursuant to section 251 (c)(3) of the Act and this part to provide a qualifying service may use the same unbundled network element to provide non-qualifying services.

Decision:

To the extent that SBC Missouri's language seeks to limit a CLEC's ability to use a UNE to provide non-qualifying services as well as qualifying services, such restrictions are contrary to the FCC's rules. To the extent that they limit access to UNEs to certificated telecommunications carriers, the language is proper.

c. CC UNE 1—SBC MO's 1(a)

47 CFR Part 51.319(03) provides that incumbent wire centers shall be classified into three tiers, once a wire center is determined to be a Tier 1 wire center, that wire center is not subject to reclassification as a Tier 2 or Tier 3 wire center; and that once a wire center is determined to be a Tier 2 wire center, that wire center is not subject to reclassification as a Tier 3 wire center.

The parties' dispute over this section relates to whether certain UNEs might be "reclassified." As SBC Missouri correctly notes, the federal rule cited above does not permit reclassification. As the CLECs correctly note, the rule in question is a matter of ongoing legal dispute, which could result in the tier system being overturned. This agreement has change of law provisions, which, if properly drafted, will permit the parties to redefine their relative obligations in this agreement when their relative obligations

change by operation of law. The complexity of this matter is sufficiently overwhelming without anticipating and providing for various legal scenarios that may or may not occur. This agreement is to be construed in light of the legal rights and obligations of the parties at the time the agreement is made.

Decision:

To the extent that a party wishes to include language that anticipates a scenario not permitted under present law, it will not be permitted to do so.

d. AT&T Rider 1

AT&T Rider 1: Should the ICA, including the Rider, only include 251(c)(3) obligations or should it include all 251, 271, and state law obligations?

SBC MO: (a) Should the ICA obligate SBC to continue to provide network elements that are no longer required to be provided under applicable law or should the ICA clearly state that SBC is required to provide only UNEs that it is lawfully obligated to provide under Section 251(c)(3) of the Act? This issue is addressed below as well as in AT&T UNE Issues 1 and 2.

(b) Does the FCC's rules allow for the state Commissions to impose additional unbundling obligations?

(c) Should declassified entrance facilities be defined as dedicated transport that does not connect a pair of wire facilities to a CLEC's network with SBC Missouri's network?

(d) Have DSO level dedicated transport been declassified in accordance with the TRO?

As more fully discussed above, as SBC Missouri must meet its obligations under §271 either through an approved SGAT or an approved interconnection agreement. AS SBC Missouri does not have an approved SGAT, its only alternative for meeting its unbundling obligations is to include them in this agreement.

47 CFR Part 51.319(d)(3) allows a state commission to petition the FCC to be allowed to require certain UNEs in certain circumstances, even though the FCC's non-impairment test has been met. Although the circumstances are narrow and this Commission has not made any such petition, it would be overbroad to say that state commissions have no authority to create additional unbundling requirements. Further, there may be other examples that may be cited, of which we are presently unaware.

SBC Missouri opposes AT&T's proposed language in Section 3.1 of the Embedded Base Rider because it would allow AT&T to invoke state law to improperly attempt to impose additional unbundling requirements on SBC Missouri. Specifically, such language seeks to allow AT&T to submit orders for adds, changes, and moves regarding its embedded base of UNE-P as of the effective date of the TRRO and for the duration of the transition plan, which directly conflicts with the TRRO and the FCC's rules. This Commission has already decided that CLEC may continue to serve their embedded customer base for the duration of the transition period, including adds, moves or changes, as long as the customer was a customer of the CLEC prior to the cut-off date in the TRRO.

Decision:

The agreement may not include language that limits its scope to §251(c)(3), but must also include §271 obligations. The agreement may not, by its terms limit or attempt to limit, in any way, the authority of this Commission. The parties must include language in the agreement that permits CLEC to serve their embedded customer base with UNE-P through the end of the FCC's transition period, but not beyond that date.

e. MCIm UNE 1

MCIm/SBC MO UNE 1: What are the appropriate geographic limitations of SBC Missouri's obligation to provide access to network elements?

Decision:

SBC Missouri's unbundling obligations arise only within SBC Missouri's incumbent territory, whether they arise from §251(c)(3) or §271. This is distinct from SBC Missouri's obligation to allow interconnection at any technically feasible point on its network, which is solely a question of the choice of the point of interconnection and not the availability of an unbundled network element.

f. MCIm UNE 4

WilTel UNE 4

MCIm/SBC MO UNE 4: When describing SBC Missouri's obligation to provide access to unbundled Network Elements, should the contract include a reference to the Section 251(d)(2) "necessary and impair" standards?

WILTEL UNE 4: Is it reasonable to place into ambiguity under the ICA whether the FCC has properly found a network element to be subject to unbundling obligations?

SBC MO: Is SBC obligated to provide access to UN Es that have never been or may formerly have been UNEs?

As has been discussed above, SBC Missouri has unbundling obligations arising from two sources in the Act: §251(c)(3) and §271. In the TRRO, the FCC found that certain unbundling obligations previously imposed on ILEC no longer applied, and ILECs were no longer required to provide those services on an unbundled basis.

Decision:

If the unbundling obligation arises solely from §251(c)(3), and the FCC has declared that the obligation no longer exists, then SBC Missouri is no longer required to offer the unbundled element at all. If the unbundling obligation is no longer required to offer the unbundled element under §251(c)(3), but continues to be obligated under §271, then the unbundled element must be offered, but need not be offered at TELRIC rates. Those §251(c)(3) unbundling obligations have not found to meet the non-impairment test must continue to be offered at TELRIC rates.

APPENDIX D

1. 47 U.S.C. § 251 provides in relevant part:

Interconnection:

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty—

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

* * * *

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall pro-

vide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty—

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

* * * *

2. 47 U.S.C. § 252 provides in relevant part:

Procedures for negotiation, arbitration, and approval of agreements:

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be

submitted to the State commission under subsection (e) of this section.

(2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning—

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond

A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement sub-

section (c) of this section upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall—

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;

(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

* * * *

(e) Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject—

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that—

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section.

3. 47 U.S.C. § 271 provides in relevant part:

> Bell operating company entry interLATA services:
>
> (a) General limitation
>
> Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section.
>
> * * * *
>
> (c) Requirements for providing certain in-region interLATA services
>
> (1) Agreement or statement
>
> A Bell operating company meets the requirements of this paragraph if it meets the requirements of subparagraph (A) or subparagraph (B) of this paragraph for each State for which the authorization is sought.
>
> (A) Presence of a facilities-based competitor
>
> A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under section 252 of this title specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 153 (47)(A) of this title, but excluding exchange access) to residential and business subscribers. For the purpose of this sub-

paragraph, such telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier. For the purpose of this subparagraph, services provided pursuant to subpart K of part 22 of the Commission's regulations (47 C.F.R. 22.901 et seq.) shall not be considered to be telephone exchange services.

(B) Failure to request access

A Bell operating company meets the requirements of this subparagraph if, after 10 months after February 8, 1996, no such provider has requested the access and interconnection described in subparagraph (A) before the date which is 3 months before the date the company makes its application under subsection (d)(1) of this section, and a statement of the terms and conditions that the company generally offers to provide such access and interconnection has been approved or permitted to take effect by the State commission under section 252 (f) of this title. For purposes of this subparagraph, a Bell operating company shall be considered not to have received any request for access and interconnection if the State commission of such State certifies that the only provider or providers making such a request have

(i) failed to negotiate in good faith as required by section 252 of this title, or

(ii) violated the terms of an agreement approved under section 252 of this title by the provider's failure to comply, within a reasonable period of time, with the implementation schedule contained in such agreement.

(2) Specific interconnection requirements

(A) Agreement required

A Bell operating company meets the requirements of this paragraph if, within the State for which the authorization is sought—

(i)

(I) such company is providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A), or

(II) such company is generally offering access and interconnection pursuant to a statement described in paragraph (1)(B), and

(ii) such access and interconnection meets the requirements of subparagraph (B) of this paragraph.

(B) Competitive checklist

Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if

such access and interconnection includes each of the following:

(i) Interconnection in accordance with the requirements of sections 251 (c)(2) and 252 (d)(1) of this title.

(ii) Nondiscriminatory access to network elements in accordance with the requirements of sections 251 (c)(3) and 252 (d)(1) of this title.

(iii) Nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the Bell operating company at just and reasonable rates in accordance with the requirements of section 224 of this title.

(iv) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.

(v) Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.

(vi) Local switching unbundled from transport, local loop transmission, or other services.

(vii) Nondiscriminatory access to—

(I) 911 and E911 services;

(II) directory assistance services to allow the other carrier's customers to obtain telephone numbers; and

(III) operator call completion services.

(viii) White pages directory listings for customers of the other carrier's telephone exchange service.

(ix) Until the date by which telecommunications numbering administration guidelines, plan, or rules are established, nondiscriminatory access to telephone numbers for assignment to the other carrier's telephone exchange service customers. After that date, compliance with such guidelines, plan, or rules.

(x) Nondiscriminatory access to databases and associated signaling necessary for call routing and completion.

(xi) Until the date by which the Commission issues regulations pursuant to section 251 of this title to require number portability, interim telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements, with as little impairment of functioning, quality, reliability, and convenience as possible. After that date, full compliance with such regulations.

(xii) Nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251 (b)(3) of this title.

(xiii) Reciprocal compensation arrangements in accordance with the requirements of section 252 (d)(2) of this title.

(xiv) Telecommunications services are available for resale in accordance with the requirements of sections 251 (c)(4) and 252 (d)(3) of this title.

47 C.F.R. § 51.309 provides:

Use of unbundled network elements:

(e) Except as provided in §51.318, an incumbent LEC shall permit a requesting telecommunications carrier to commingle an unbundled network element or a combination of unbundled network elements with wholesale services obtained from an incumbent LEC.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed June 18, 2008]

No. 07-13028

D.C. Docket No. 06-00308
CV-4-SPM-WCS CLERK

NUVOX COMMUNICATIONS, INC.,
XSPEDIUS COMMUNICATIONS, LLC,
Plaintiffs-Appellees,

v.

BELLSOUTH COMMUNICATIONS, INC.,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

(June 18, 2008)

Before EDMONDSON, *Chief Judge*, HILL and ALARCÓN,* *Circuit Judges.*

PER CURIAM:

This case arises from a decision of the Florida Public Service Commission (the "Florida Commission"). The Florida Commission, relying on a Federal Communications Commission (FCC) decision, con

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* Honorable Arthur L. Alarcón, United States Circuit Judge for the Ninth Circuit, sitting by designation.

cluded that federal law did not require BellSouth ("Defendants") to combine (or "commingle") facilities that must be provided under 47 U.S.C. § 271 with those that must be provided under 47 U.S.C. § 251. Nuvox Communications, Inc. and Xspedius Communications, LLC ("Plaintiffs") challenged the Florida Commission's decision in federal court, and the district court ruled that the decision was contrary to federal law. We affirm the district court decision.

The Telecommunications Act of 1996

The Telecommunications Act of 1996 (the "Telecommunications Act") imposes a series of requirements on incumbent local exchange carriers ("incumbent LECs")—companies like BellSouth that traditionally have provided local telephone service in a particular geographic area. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). Before the Telecommunications Act, most areas were served by a single local exchange carrier. Because these incumbent LECs were without competition and often were compensated based on how much they spent, incumbent LECs had an incentive to construct inefficient networks. *See MCI Worldcom Commc'ns, Inc. v. Bellsouth Telecomms., Inc.*, 446 F.3d 1164, 1166-67 (11th Cir. 2006). Congress enacted the Telecommunications Act to "uproot[] the monopolies that traditional rate-based methods had perpetuated." *Verizon Commc'ns Inc. v. FCC*, 535 U.S. 467, 488 (2002).

One of the affirmative duties imposed on incumbent LECs by the Telecommunications Act is to allow new competitors—known as competitive local exchange carriers ("competitive LECs")—to lease parts of the incumbent LECs' telephone networks. 47 U.S.C. §§ 153(29), 251(c)(3). Incumbent LECs are required to make available their "unbundled network

elements" ("UNE"s); and the rates that the incumbent LECs may charge for access to these elements must be based on cost. *Id.* § 251(c)(3), 252(d)(1)(A). This practice keeps the prices very low. *Verizon Commc'ns*, 122 S. Ct. at 1661.

The duties imposed by section 251 are implemented through "interconnection agreements" between incumbent LECs and competitive LECs. The Telecommunications Act requires LECs to negotiate in "good faith" the "particular terms and conditions of agreements to fulfill the duties described in [section 251(b) and (c)]." 47 U.S.C. § 251(c)(1). If negotiations are unsuccessful, either party may ask the state commission to arbitrate open issues that the parties have not resolved. In deciding these issues, the state commission must adhere to the requirements of the statute and the FCC's implementing regulations. 47 U.S.C. § 252(b), (c).

The Telecommunications Act also established a process by which the Bell operating companies ("BOCs") could obtain authority from the FCC on a state-by-state basis to provide long-distance service. 47 U.S.C. § 271(d). Under section 271, the FCC is authorized to grant a BOC's application to provide long-distance service in a given state if the BOC satisfies certain statutory criteria designed to confirm that the local market in the state is open to competition. *Id.* at § 271(d)(3). The BOC must implement a "competitive checklist"—a list of services and facilities that the BOC must make available to competitive LECs oper-

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The BOCs are a set of companies, including BellSouth, that formerly were associated with the Bell system. 47 U.S.C. § 153(4).

ating in the state. § 271(c)(2)(B). The services and facilities on this checklist include some of the same network elements that the FCC concluded should be subject to unbundling under section 251.

In 2003, the FCC ruled that elements that are required to be made available only under section 271—unlike elements required under section 251—need not be provided in combined, prepacked form. *See* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, 17384–86, ¶¶ 653-55 (2003) ("Triennial Review Order"). Also, a different pricing scheme applies to facilities that must be made available only under section 271. *See id.* at 17386, ¶¶ 656-57. The D.C. Circuit affirmed the FCC's decision, concluding that these were "important respects" in which section 251 and section 271 differ. *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 589-90 (D.C. Cir. 2004).

The FCC also eliminated its general ban on "commingling, " defined as combining loops or loop-transport combinations obtained as unbundled network services with services obtained at wholesale from an incumbent LEC. *See* Triennial Review Order, 188 FCC Rcd at 17342-43, ¶ 579. The FCC's commingling requirement contains the statement: "[A]n incumbent LEC shall permit a requesting telecommunications carrier to commingle an unbundled network element or a combination of unbundled network elements

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The FCC has held that the obligations of the section-271 competitive checklist continue even after the BOC obtains authority to provide long-distance service in a given state.

with wholesale services obtained from an incumbent LEC." 47 C.F.R. § 51.309(e).

Procedural History

Plaintiffs filed a petition for arbitration with the Florida Commission on 11 February 2004. The Florida Commission concluded that the FCC did not intend for its commingling requirement to apply to section-271 elements. The Florida Commission also decided that reading the FCC's general discussion of commingling to require combinations of section-251 and section-271 facilities would be contrary to federal policy. After the parties drafted an interconnection agreement in conformance with the Arbitration Order, the Florida Commission approved the final agreement.

Plaintiffs then challenged the Florida Commission's orders in the United States District Court for the Northern District of Florida. The district court reversed the Florida Commission; the district court concluded that the FCC's commingling requirements mandated that BellSouth combine facilities provided under section 271 with those that must be provided under section 251. Defendants appealed.

Standard of Review

This Court reviews *de novo* questions of law. *AT&T Commc'ns of the S. States, Inc. v. BellSouth Telecomms., Inc.*, 268 F.3d 1294, 1296 (11th Cir. 2001). "Federal courts generally accord no deference to the state commission's interpretations of federal law." *MCI Worldcom*, 446 F.3d at 1170 (internal quotation omitted). The state agency's findings of fact "will not be disturbed unless they are arbitrary and capricious or not supported by substantial evidence." *Id.*

Discussion

The issue in this case is whether BellSouth—an incumbent LEC—is required to commingle section-271 elements with section-251 unbundled network elements. The FCC requires an incumbent LEC to "permit a requesting telecommunications carrier to commingle an unbundled network element or a combination of unbundled network elements with *wholesale services* obtained from an incumbent LEC." 47 C.F.R. § 51.309(e) (emphasis added). Because the district court correctly concluded that section-271 elements are wholesale services, we affirm the district court's judgment.

Both Rule 51.309 and the FCC's Triennial Review Order make clear that the commingling requirement applies to wholesale facilities and services. Under Rule 51.309(e),

> [A]n incumbent LEC shall permit a requesting telecommunications carrier to commingle an unbundled network element or a combination of unbundled network elements with *wholesale services* obtained from an incumbent LEC.

47 C.F.R. § 51.309(e) (emphasis added). Subsection (f) of Rule 51.309 contains this language:

> Upon request, an incumbent LEC shall perform the functions necessary to commingle an unbundled network element or a combination of unbundled network elements with *one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale* from an incumbent LEC.

Id. at § 51.309(f) (emphasis added).

The Triennial Review Order defines commingling as "the connecting . . . of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at *wholesale* from an incumbent LEC." Triennial Review Order, 18 FCC Rcd at 17342, ¶ 579 (emphasis added). Also stated in Paragraph 579 of the Triennial Review Order:

> [A]n incumbent LEC shall permit a requesting telecommunications carrier to commingle a UNE or a UNE combination with *one or more facilities or services that a requesting carrier has obtained at wholesale* from an incumbent LEC.

Id. (emphasis added).

The FCC has, on several occasions, made clear that section-271 elements are "wholesale." *See Petition of Qwest Corp. For Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metro. Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19448-50, 65-68 (2005) (referring repeatedly to section 271(c) requirements as "wholesale" obligations); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 1958, 1962-63 (2007) (describing an earlier order as "rel[ying] on the continued availability of *wholesale* access to Qwest's network under section 271") (emphasis added). Defendants have identified no evidence to suggest that section-271 elements are not wholesale services or facilities. Indeed, Defendants' own expert testified before the Florida Commission that section-271 elements are wholesale.

Defendants raise four separate arguments in support of their position that the commingling requirement does not apply to section-271 elements: (1) the FCC declined to apply its combination rule to section-271 elements; (2) the commingling rule only applies to "wholesale services" that are subject to FCC tariffs; (3) the elimination of language in the Triennial Review Order suggests that the FCC intended to except section-271 elements from the commingling requirement; and (4) the district court's ruling would revive the anticompetitive UNE platform. We do not find Defendants' arguments persuasive.

The FCC's combination rule is not important to the issue here. Defendants point to footnote 1990 of the Triennial Review Order that states, "We decline to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251." 18 FCC Rcd at 17386, ¶ 655 n.1990. This footnote addresses *combinations* of section-271 elements with other section-271 elements, not the commingling of section-251 elements with section-271 elements. *See USTA II*, 359 F.3d at 589-90 (rejecting plaintiff's argument that the rule that applies to combinations of section-251 elements with section-251 elements should also apply to section-271 elements).

We reject Defendants' argument that Rule 51.309 applies only to those wholesale services that are tariffed. As the district court correctly noted, that tariffed services are listed as examples of wholesale services does not indicate that such lists are ex-

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The set of combined unbundled network elements that provides all of the facilities necessary to provide telecommunications service is known as the "UNE platform."

haustive. Language like "e.g." and "including" indicates that tariffed services were being used as examples of services eligible for commingling. Defendants' interpretation cannot be reconciled with the expansive language in both Rule 51.309 and in the Triennial Review Order.

We also reject Defendants' argument that the removal of language in Paragraph 584 of the Triennial Review Order was a clear decision to exclude section-271 elements from commingling. The review order originally stated in Paragraph 584:

> [W]e require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including *elements offered pursuant to section 271 and* any services offered for resale pursuant to section 251(c)(4) of the Act.

18 FCC Rcd at 17347, ¶ 584 (2003). The final version did not contain the underlined language. Triennial Review Order Errata, 18 FCC Rcd at 19022, ¶ 27.

As amended, Paragraph 584 pertains exclusively to 251(c)(4) resale and makes clear that services obtained under that statute are included in the commingling requirement. We agree with the district court that the alteration of Paragraph 584 reasonably reflects the FCC's decision to remove language that could be read as conflating 251(c)(4) resale with section-271(c) checklist obligations. The elimination of potentially confusing language from Paragraph 584 does not narrow the otherwise broad "wholesale services" language in the commingling requirement to exclude specifically section-271 elements.

In addition, we do not find Defendants' argument about the UNE platform persuasive. Defendants

contend that requiring commingling of section-251 and section-271 elements would essentially revive the UNE platform—which was eliminated as anticompetitive because it allowed competitive LECs to obtain all the necessary elements for a telecommunications network from incumbent LECs at a lower cost than they would incur if they developed the facilities on their own. *See AT&T*, 525 U.S. at 388-91; *U. S. Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002). We disagree. Incumbent LECs are permitted to charge market rates for section-271 elements, making them distinguishable from the cost-based facilities mandated under the original UNE platform.

AFFIRMED.

(2)

No. 08-531

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MISSOURI PUBLIC SERVICE COMMISSION, ET AL.,
Petitioners,

v.

SOUTHWESTERN BELL TELEPHONE, L.P.
D/B/A SBC MISSOURI
(N/K/A SOUTHWESTERN BELL TELEPHONE COMPANY
D/B/A AT&T MISSOURI), ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT SOUTHWESTERN BELL TELEPHONE COMPANY IN OPPOSITION

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November 21, 2008

QUESTION PRESENTED

Whether this Court should grant review of the Eighth Circuit's judgment to address an issue never addressed or resolved in the Eighth Circuit's decision – namely, whether a federal regulation, 47 C.F.R. § 51.309, authorizes state public utility commissions to require incumbent telephone companies to offer their competitors the ability to lease pre-combined groups of the incumbents' facilities.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Southwestern Bell Telephone Company d/b/a AT&T Missouri (formerly known as Southwestern Bell Telephone, L.P. d/b/a SBC Missouri) states the following:

Southwestern Bell Telephone Company d/b/a AT&T Missouri is a wholly owned, indirect subsidiary of AT&T Inc., which is a publicly held company. AT&T Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

During the pendency of the proceedings before the district court and the court of appeals, respondent was organized as a limited partnership known formally as Southwestern Bell Telephone, L.P. Beginning on June 21, 2007, the limited partnership was discontinued and it became a Missouri corporation known formally as Southwestern Bell Telephone Company.

Respondent here refers to itself by its trade name, AT&T Missouri.

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INTRODUCTION

There is no conflict in the circuits that could warrant this Court's review. In the decision below, the Eighth Circuit held that state public utility commissions lack authority to implement 47 U.S.C. § 271, a provision of the Telecommunications Act of 1996 ("the 1996 Act"). *See* Pet. App. 9a-12a. That holding is consistent with every other federal court to have addressed the question – nine district courts and the First Circuit, which is the one other circuit court to have reached the issue. Each of these courts has held that the Federal Communications Commission ("FCC") has exclusive jurisdiction over § 271.[1]

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[1] *See Verizon New England Inc. v. Maine Pub. Utils. Comm'n*, 509 F.3d 1, 4-6 (1st Cir. 2007); *BellSouth Telecomms., Inc. v. Georgia Pub. Serv. Comm'n*, Nos. 1:06-cv-00162-CC & 1:06-cv-00972-CC, slip op. at 7-12 (N.D. Ga. Jan. 3, 2008), *appeals pending*, Nos. 08-10521-AA & 08-10522-AA (11th Cir. argued Oct. 8, 2008); *Michigan Bell Tel. Co. v. Lark*, No. 06-11982, 2007 WL 2868633, at *5-*6 (E.D. Mich. Sept. 26, 2007), *appeals pending on other grounds*, Nos. 07-2469 & 07-2473 (6th Cir. to be argued Dec. 10, 2008); *BellSouth Telecomms., Inc. v. Kentucky Pub. Serv. Comm'n*, No. 06-65-KKC, 2007 WL 2736544, at *5-*7 (E.D. Ky. Sept. 18, 2007); *Qwest Corp. v. Arizona Corp. Comm'n*, 496 F. Supp. 2d 1069, 1077-79 (D. Ariz. 2007), *appeals pending*, Nos. 07-17079 & 07-17080 (9th Cir. filed Nov. 18, 2007); *Illinois Bell Tel. Co. v. O'Connell-Diaz*, No. 05-C-1149, 2006 WL 2796488, at *13-*14 (N.D. Ill. Sept. 28, 2006), *appeals pending*, Nos. 08-1489 & 08-1494 (7th Cir. argued Sept. 19, 2008); *Dieca Communications, Inc. v. Florida Pub. Serv. Comm'n*, 447 F. Supp. 2d 1281, 1285-86 (N.D. Fla. 2006), *appeal voluntarily dismissed with prejudice*, No. 06-15589-DD (11th Cir. Dec. 12, 2006) (per curiam); *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055, 1066-69 (E.D. Mo. 2006), *aff'd in relevant part*, 530 F.3d 676, 682-83 (8th Cir. 2008); *Verizon New England Inc. v. New Hampshire Pub. Utils. Comm'n*, No. 05-cv-94-PB, 2006 WL 2433249, at *8 (D.N.H. Aug. 22, 2006), *aff'd sub nom. Verizon New England Inc. v. Maine Pub. Utils. Comm'n*, 509 F.3d 1 (1st Cir. 2007); *BellSouth*

Petitioners claim that the decision below conflicts with an Eleventh Circuit decision addressing a different question – namely, whether a specific regulation (47 C.F.R. § 51.309) authorizes state commissions to require incumbent local exchange carriers to offer their competitors the ability to lease pre-combined groups of the incumbents' facilities. Because the Eighth Circuit did not consider that question in this case, there is no division of authority even arguably warranting the Court's review.

STATEMENT OF THE CASE

1. To promote competition in the market for local telephone service, Congress in the 1996 Act imposed various obligations on incumbent local exchange carriers ("incumbent LECs" or "incumbents") such as AT&T Missouri to assist competitive local exchange carriers ("competitive LECs" or "competitors") in entering the market. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). This case involves two separate provisions of the 1996 Act: 47 U.S.C. § 251 and 47 U.S.C. § 271.

a. Section 251 obligates incumbents to lease certain network elements to competitors at regulated rates. The statute directs the FCC to determine which elements must be made available under § 251(c)(3), *see* 47 U.S.C. § 251(d)(2), and those facilities are known as "unbundled" network elements, or "UNEs." When a facility is designated as a UNE by

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Telecomms., Inc. v. Mississippi Pub. Serv. Comm'n, 368 F. Supp. 2d 557, 565-66 (S.D. Miss. 2005). The lone contrary decision, *Verizon New England Inc. v. Maine Pub. Utils. Comm'n*, 441 F. Supp. 2d 147 (D. Me. 2006), was vacated and remanded by the First Circuit in *Verizon New England*, 509 F.3d 1.

the FCC, incumbents must offer the element at artificially low rates set by state commissions.[2]

Section 251's network-sharing obligations are not self-executing, but instead are implemented through "interconnection agreements." Incumbents and competitors negotiate those agreements in the first instance. Where they are unable to agree, § 252 authorizes state commissions to act as arbitrators. *See id.* § 252(b)-(d). State commissions' arbitration authority is confined to matters addressed in § 251. *See id.* § 252(c)-(d); *MCI Telecomms. Corp. v. BellSouth Telecomms., Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002) (per curiam).

b. Section 271 authorizes the FCC to grant the largest incumbent LECs, known as Bell operating companies ("BOCs"), authority to provide long-distance service in a given state, provided the BOC satisfies statutory criteria designed to confirm that the local market in the state is open to competition. *See* 47 U.S.C. § 271(d)(3); *AT&T Corp. v. FCC*, 220 F.3d 607, 612 (D.C. Cir. 2000). Those criteria include a showing that the BOC satisfies the "[c]ompetitive checklist" – which is a list of services and facilities that the BOC must make available to competitors operating in the state. 47 U.S.C. § 271(c)(2)(B).

Unlike § 251, where Congress gave state commissions a role to play in implementing the federal regime, Congress granted the FCC exclusive authority to implement § 271. Congress granted the FCC alone the responsibility to approve or reject BOCs' applications to offer long-distance service, *see id.* § 271(d)(3),

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[2] *See United States Telecom Ass'n v. FCC*, 359 F.3d 554, 562 (D.C. Cir. 2004) ("*USTA II*") (noting that UNE rates "fall well below the costs the [incumbents] had actually historically incurred in constructing the elements").

and it empowered the FCC alone to enforce the requirements of § 271 after approval, *see id.* § 271(d)(6). Congress gave the states only an advisory role in the § 271 application process. *See id.* § 271(d)(2)(B).

In addition, the rates incumbents may charge competitors for access to § 271 elements differ markedly from the rates they are required to charge for § 251 UNEs. Section 251(d)(2), which sets the pricing standard for UNEs, does not apply to § 271 elements. Instead, 47 U.S.C. §§ 201 and 202, which require rates to be just, reasonable, and nondiscriminatory, establish the standard for assessing the rates at which BOCs provide § 271 elements. *See Triennial Review Order*,[3] 18 FCC Rcd at 17389, ¶ 664; *USTA II*, 359 F.3d at 589 (rejecting a challenge to the *Triennial Review Order* on this point). Applying that standard to § 271 elements, the FCC has said that "the market price should prevail, as opposed to a regulated rate." *UNE Remand Order*,[4] 15 FCC Rcd at 3906, ¶ 473.

Finally, the FCC has held that elements that are required only under § 271 – unlike elements required under § 251 – need not be provided in combined, pre-packaged form. *See Triennial Review*

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[3] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*") (subsequent history omitted).

[4] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*") (subsequent history omitted).

Order, 18 FCC Rcd at 17386, ¶ 655 n.1990 ("We decline to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251."); *see also USTA II*, 359 F.3d at 589-90 (affirming FCC's no-combinations holding).

2. On three occasions from 1996 through 2003, the FCC purported to implement § 251 by issuing orders that imposed "blanket" unbundling. *Iowa Utils. Bd.*, 525 U.S. at 390. With limited exceptions, these FCC orders required incumbents to make available as UNEs – and thus at artificially low, regulated rates – all of the basic elements of their local telephone networks in pre-combined form. This requirement, known as the "UNE-Platform," permitted competitors to provide service using only the incumbents' facilities, priced at the deeply discounted rates that apply to UNEs. *See* Pet. App. 6a.

Each time the FCC imposed blanket unbundling, the federal courts vacated the rules as inconsistent with the 1996 Act's goal of encouraging competitors to compete using their own facilities. *See Iowa Utils. Bd.*, 525 U.S. at 388-92; *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*"); *USTA II*, 359 F.3d 554. After the last of those judicial vacaturs, the FCC issued an order in 2005 that established, among other things, that competitive LECs could no longer obtain the "UNE-Platform." *See* Pet. App. 6a.

3. In the aftermath of the FCC's 2005 order, some state commissions sought to continue to require incumbents to provide the UNE-Platform despite the FCC's elimination of blanket unbundling. Faced with the FCC's conclusion that § 251 does not require incumbents to offer the UNE-Platform, these state

commissions relied on § 271 instead. In the order at issue in this case, the Missouri commission – petitioner here – concluded that § 271 provided it authority to require AT&T Missouri to continue to provide the UNE-Platform to competitors at regulated rates. *See* Pet. App. 8a, 32a, 118a-119a.

a. AT&T Missouri initiated this action to obtain declaratory and injunctive relief from the Missouri commission's order. It contended that the order violated federal law for multiple reasons. First, AT&T Missouri argued that the Missouri commission lacked authority to implement § 271. Second, AT&T Missouri argued that, regardless of the source of its purported authority, the Missouri commission's order conflicted with substantive FCC rules in two ways: (i) it required AT&T Missouri to provide access, at rates set by the commission, to elements that the FCC had said should be priced at market rates; (ii) it directed AT&T Missouri to "combine" elements available under § 271, despite the FCC's holding that § 271 (unlike § 251) does not include a requirement to combine facilities.

Agreeing with AT&T Missouri's first contention, the district court held that the Missouri commission lacked authority to implement § 271. *See* Pet. App. 31a-38a. The court explained that "[t]he text of § 271 gives the FCC exclusive jurisdiction over the enforcement of that section" and that the state commission's "only role" under § 271 is "to act as consultant to the FCC during the application process." *Id.* at 34a.

The district court also agreed that the Missouri commission's order conflicted with substantive rules promulgated by the FCC. *See id.* at 39a-42a. The court explained that the Missouri commission unlawfully required AT&T Missouri (i) to "combine"

facilities that are required only under § 271 with facilities required under § 251, and (ii) to provide competitors "the same substantive combination as the UNE Platform" at a rate set by the state commission. *Id.* at 39a.

b. In affirming, the Eighth Circuit addressed only the first rationale supporting the district court's judgment – *i.e.*, the district court's conclusion that the Missouri commission violated federal law in purporting to implement § 271. The court explained that "the plain language of § 271 makes clear states have no authority to interpret or enforce the obligations of" that provision. Pet. App. 10a (citing *Verizon New England*, 509 F.3d at 7). The court further noted that the 1996 Act does authorize states to implement § 251. The contrast between § 251 on the one hand and § 271 on the other hand "'confirms that when Congress envisaged state commission power to implement the statute, it knew how to provide for it.'" *Id.* at 11a-12a (quoting *Verizon New England*, 509 F.3d at 7). The court accordingly "join[ed]" the other federal courts – including the First Circuit – that unanimously "have concluded the FCC has exclusive jurisdiction over § 271." *Id.* at 12a; *see supra* note 1 (collecting decisions reaching the same conclusion).

The Eighth Circuit did not reach the district court's separate holding that federal law foreclosed the Missouri commission's requirement that AT&T Missouri "combine" facilities that are required only under § 271 with facilities required under § 251.

REASONS FOR DENYING THE PETITION

1. The petition seeks review of the Eighth Circuit's judgment in order to address whether the FCC's "commingling" rule, 47 C.F.R. § 51.309, requires incumbent LECs to combine facilities that are made available pursuant to § 271 with facilities made available pursuant to § 251. The petition contends (at 7-11) that the Eighth Circuit's ruling on that point conflicts with the Eleventh Circuit's decision in *NuVox Communications, Inc. v. BellSouth Communications, Inc.*, 530 F.3d 1330 (11th Cir. 2008) (per curiam). But there is no conflict, because, whereas the Eleventh Circuit's decision in *NuVox* actually addressed the issue the petition seeks to raise, the Eighth Circuit's decision in the case at issue here did not.

In the state proceeding at issue in *NuVox*, the Florida commission concluded that interpreting the FCC's commingling rule to require incumbents to provide "combinations of section-251 and section-271 facilities would be contrary to federal policy." 530 F.3d at 1332. The Florida commission did not in that proceeding address the issue in this case – that is, whether state commissions have authority to implement § 271. The district court in *NuVox* reversed the Florida commission's determination, concluding that the FCC's commingling rule requires BOCs to combine facilities provided under § 271 with those that must be provided under § 251. *See NuVox Communications, Inc. v. Edgar*, 511 F. Supp. 2d 1198, 1203-04 (N.D. Fla. 2007). The court of appeals affirmed, addressing solely "[t]he issue . . . whether [a BOC] is required to commingle section-271 elements with section-251 unbundled network elements." 530 F.3d at 1333. The Eleventh Circuit did not mention

state commissions' authority to implement § 271, *see id.* at 1333-35, and indeed the two district courts in the Eleventh Circuit to have addressed the question concluded that state commissions have no such authority.[5]

In contrast to the Eleventh Circuit's decision on commingling, the Eighth Circuit's decision in this case addressed the question of state commissions' authority to implement § 271. *See* Pet. App. 9a-12a. The Eighth Circuit made no mention of the commingling issue that the Eleventh Circuit decided in *NuVox*; in fact, the court below did not even cite the rule that petitioners assert is at issue here. Nor did the decision below reach the district court's independent holding that a state-commission order requiring incumbents to provide combinations of facilities conflicts with FCC orders. *See id.* Because the Eighth and Eleventh Circuits addressed different questions, there is no conflict between the decision below and *NuVox* that could merit this Court's review.

2. Review is unwarranted for the additional reason that, even under the Eleventh Circuit's decision,

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[5] A separate Florida commission decision held that state commissions lack authority to implement or enforce § 271. A Florida district court affirmed that Florida commission order in *Dieca*, 447 F. Supp. 2d at 1286 (cited *supra* note 1). An appeal of the district court's judgment in *Dieca* was dismissed with prejudice on the appealing competitor's motion. *See* Order, No. 06-15589-DD (11th Cir. Dec. 12, 2006) (per curiam). In addition, a Georgia district court reversed a Georgia commission order asserting jurisdiction to implement § 271; that case is now pending in the Eleventh Circuit. *See BellSouth*, Nos. 1:06-cv-00162-CC & 1:06-cv-00972-CC, slip op. at 7-12 (cited *supra* note 1). Thus, the only courts in the Eleventh Circuit to have addressed the § 271-authority question that the Eighth Circuit decided in this case reached the same conclusion as the decision below.

the result in this case would have been the same. The *NuVox* court made clear that, where a state applies the FCC's "commingling" rule to require an incumbent LEC to combine a § 251 UNE with an element that must be made available under § 271, the resulting combination of facilities would be priced at "market rates." *See* 530 F.3d at 1335 ("Incumbent LECs are permitted to charge market rates for section-271 elements, making them distinguishable from the cost-based facilities mandated under the original UNE platform."); *see also supra* pp. 3-4 (explaining FCC's conclusion that market prices apply to § 271 elements); Pet. 9 (noting the Eleventh Circuit's holding on this point). The Missouri commission's decision at issue here, by contrast, required AT&T Missouri to provide the UNE-Platform at a regulated rate established by the state commission. *See* Pet. App. 119a. Even under the Eleventh Circuit's reasoning, that state-commission requirement would conflict with federal law, as the district court here recognized. *See id.* at 39a-41a (reasoning that, even if the Missouri commission had authority to require unbundling of § 271 elements, its decision would be unlawful, in part because it required AT&T Missouri to provide § 271 elements at the same transitional rates that the FCC set for § 251 UNEs). Thus, even if the Eighth Circuit had reached the commingling issue and decided it in petitioners' favor, the Eleventh Circuit's approach would have resulted in affirming the district court's judgment, confirming that there is no conflict between the circuits.

3. Finally, even if a circuit conflict existed on the interpretation of the FCC's commingling rule, the FCC could address that conflict itself through the exercise of its authority to interpret and enforce the

1996 Act. *See National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-84 (2005) (holding that FCC can interpret ambiguous statutory provisions even after a court of appeals purports to construe them, and when it does so its determination is binding nationwide under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)); *see also Federal Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1155 (2008) (the Court "accept[s]" an agency's interpretation of its own regulation unless it is "'plainly erroneous or inconsistent with the regulation'") (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). That the FCC has not addressed the interpretive question at issue in the Eleventh Circuit's *NuVox* case is yet another reason counseling against this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 08-531

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IN THE

Supreme Court of the United States

MISSOURI PUBLIC SERVICE COMMISSION; JEFF DAVIS; CONNIE MURRAY; ROBERT M. CLAYTON III; TERRY JARRETT; KEVIN GUNN, in their official capacities as Commissioners of the Missouri Public Service Commission and not as individuals,
Petitioners,

v.

SOUTHWESTERN BELL TELEPHONE, L.P., doing business as SBC Missouri,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Does a State commission have authority under federal law to implement and enforce Federal Communications Commission ("FCC") rules and orders governing unbundling under Section 251(c)(3) of the Telecommunications Act of 1996 ("the Act") when arbitrating an interconnection agreement under Section 252(b)(1) of the Act if those rules and orders require an incumbent local exchange carrier and Bell Operating Company to permit a requesting carrier to commingle wholesale services obtained pursuant to Section 271(b)(2)(B) with leased unbundled network elements, or has the Eighth Circuit ruled that such authority does not exist?

CORPORATE DISCLOSURE STATEMENT

Pursuant to United States Supreme Court Rule 29.6, Respondents, all nongovernmental corporate parties to this proceeding, state as follows:

Respondent NuVox Communications of Missouri, Inc., a Delaware corporation, is a wholly-owned subsidiary of Gabriel Communications Finance Company, a Delaware corporation, which is a wholly-owned subsidiary of NuVox, Inc., a Delaware corporation. NuVox, Inc. is a privately held Delaware corporation and has no parent corporation. No publicly held company owns 10% or more of NuVox, Inc.

Respondent Socket Telecom, LLC, is a wholly-owned subsidiary of Socket Holdings Corporation. There is no public company that is a 10% or greater shareholder of Socket Holdings Corporation.

Respondent XO Communications Services, Inc. is a wholly-owned subsidiary of XO Communications, LLC, which is a wholly-owned subsidiary of XO Holdings, Inc., a publicly held Delaware corporation. No publicly held company owns 10% or more of XO Holdings, Inc.

Respondents Xspedius Management Co. of Kansas City, LLC and Xspedius Management Co. Switched Services, LLC, have been consolidated into a single entity named tw telecom of kansas city llc. The company, tw telecom of kansas city llc, is a wholly-owned subsidiary of tw telecom holdings, inc., which is a wholly-owned subsidiary of tw telecom inc., a publicly held corporation. No publicly held corporation owns 10% or more of tw telecom inc.'s stock.

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47 U.S.C. § 252 ..... *passim*

47 U.S.C. § 271 ..... *passim*

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IN THE

Supreme Court of the United States

No. 08-531

MISSOURI PUBLIC SERVICE COMMISSION; JEFF DAVIS; CONNIE MURRAY; ROBERT M. CLAYTON III; TERRY JARRETT; KEVIN GUNN, in their official capacities as Commissioners of the Missouri Public Service Commission and not as individuals,
Petitioners,

v.

SOUTHWESTERN BELL TELEPHONE, L.P., doing business as SBC Missouri,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Until the 1990s, local phone service was considered a natural monopoly. States typically granted an exclusive franchise in each local service area to a single local exchange carrier which owned all of the facilities necessary to provide local service, including local loops (wires connecting telephones to switches), the switches (equipment directing calls to their des-

tinations), and the transport (wires carrying calls between switches). *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). With the passage of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in the scattered sections of 47 U.S.C.) (the "Act"), Congress fundamentally restructured the competitive opportunities in the local telecommunications markets. *Id.*

In order to promote competition in the provision of local telephone services, Congress expanded the federal role over local telecommunications. *Id.* at 371-372. Authority to set national standards concerning certain market-opening requirements of the Act was conferred on the Federal Communications Commission ("FCC"), but the Act simultaneously provided that the States, and not the FCC (unless a State fails to act), would arbitrate and approve interconnection agreements between the former monopoly telephone companies and competitors. 47 U.S.C. §§ 251, 252; *Iowa Utils. Bd.*, 525 U.S. at 372.

Two distinct portions of the Act establish the rights and obligations of the former monopoly telephone companies and their competitors. Section 251 imposes a series of affirmative duties upon *all* incumbent local exchange carriers ("ILECs"); Section 271 imposes a separate set of obligations on *only* the ILECs that are former Bell Operating Companies ("BOCs"), including Southwestern Bell Telephone, L.P., d/b/a SBC Missouri ("SBC"),[1] that were divested from AT&T in the consent decree entered in the antitrust

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[1] Subsequent to the filing of its appeal in the Federal District Court, SBC merged with AT&T Corporation, and is now doing business as AT&T Missouri. For consistency with the record below, however, Respondents use the name "SBC" throughout this Brief in Opposition.

suit brought by the U. S. Department of Justice.[2] These Section 271 obligations were imposed by Congress as a condition of removing the MFJ's ban prohibiting the BOCs from providing long distance services. The obligations include enumerated "competitive checklist" items the BOCs must provide to competitive local exchange carriers ("CLECs") to ensure that the market for local services is irreversibly open to competition.

While Congress specified in Section 271 which parts of the telephone network BOCs must make available to competitors, it left to the FCC under Section 251 the task of determining which unbundled network elements ("UNEs") *all* ILECs must make available to CLECs. Congress directed the FCC to consider, at a minimum, whether "access to such network elements as are proprietary in nature is necessary" to the competing carrier and whether "the failure to provide access to such network elements would impair the ability of" the competing carrier to offer its services. 47 U.S.C. § 251(d)(2). This "necessary and impair" standard delineates the limits of any ILEC's obligations to offer to competitors access to network elements on an unbundled basis at cost-based rates pursuant to Section 251 requirements. *Iowa Utils. Bd.*, 525 U.S. at 391-392.

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[2] District Judge Harold Greene approved the consent decree between the government and AT&T in the form of a Modified Final Judgment ("MFJ") entered in 1982. *See United States v. Am. Tel. & Tel. Co.*, 552 F.Supp. 131 (D.D.C. 1982), aff'd *sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). When the MFJ was entered, there were seven (7) "Baby Bells." Mergers between and among the BOCs and other companies have left only three (SBC [which has inherited the "AT&T" name], Qwest, and Verizon).

The task of defining which elements are "necessary" and what constitutes "impairment" under Section 251 has been the subject of numerous FCC rulemaking decisions, appeals and remands since the FCC's first unbundling order was released in 1996.[3] Originally, the network elements the FCC ordered must be unbundled under Section 251 was substantially the same as the "checklist items" Congress required the BOCs to make available under Section 271. App. 6a.[4] Over time, however, the list of elements found to satisfy the "necessary and impair" standard has changed and shrunk, with the result that fewer elements are required to be available as UNEs under Section 251 than Congress required be made available by the BOCs in Section 271. *Id.*

The FCC expressly ruled in its *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 F.C.C.R. 16978, 17387 (2003) (*"TRO"*), that even when Section 251 no longer requires the ILECs to provide their competitors with UNEs based on a finding of "impairment," there nonetheless exists for the BOCs a separate obligation to provide access to the checklist items under Section 271. The FCC also concluded that the difference in obligations imposed by Sections 271 and 251 lies in both scope (application only to the BOCs rather than all ILECs) and the appropriate pricing standard ("just and

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[3] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 F.C.C.R. 15499 (1996).

[4] The abbreviation "App." refers to the Appendix to the Petition for Certiorari.

reasonable" rates versus "just and reasonable rates" that are also "cost-based").[5] *Id.*

It was against this background that on March 30, 2005, SBC filed its Petition for Arbitration with the Missouri Public Service Commission ("MPSC") pursuant to Section 252 of the Act to arbitrate issues unresolved in the negotiation of interconnection agreements between SBC and various CLECs, including the Coalition Respondents. App. 86a-87a.[6] A central issue in the arbitration was whether, as Coalition Respondents contended, the MPSC's authority under Section 252 of the Act included authority to require SBC to provide to CLECs as part of their interconnection agreements local loops, local transport, and local switching elements that are required under Section 271, but not under Section 251, at rates the MPSC determined are "just and reasonable" rates. App. 166a-171a. Following a hearing and the submission of briefs, the Arbitrators issued their rulings on the unresolved issues, including rulings consistent with Coalition Respondents' position regarding the scope of State commission authority under Section 252. *Id.*

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[5] The FCC's ruling establishing that Section 271 unbundling obligations are independent of and in addition to Section 251 obligations was affirmed by the D.C. Circuit in *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 589 (D.C. Cir. 2004).

[6] NuVox Communications of Missouri, Inc., Socket Telecom, LLC, XO Communications Services, Inc., Xspedius Management Co. of Kansas City, LLC, and Xspedius Management Co. Switched Services, LLC, were parties to the MPSC proceeding as members of the "CLEC Coalition." (Big River Telephone Company, LLC also was a member but is no longer participating as a member and does not join in this Brief in Opposition.) This group was referred to collectively as the "Coalition Defendants" below, and are referred to collectively herein as the "Coalition Respondents."

The MPSC thereafter issued its Arbitration Order in which it approved the Arbitrators' rulings on this central issue. App. 93a.

SBC appealed portions of the MPSC's Arbitration Order to the federal District Court. In particular, SBC challenged the MPSC's ruling that under its Section 252 arbitration authority it can require SBC to provide to CLECs as part of their interconnection agreements local loops, local transport, and local switching elements that are required under Section 271, but not under Section 251, of the Act at rates the MPSC determined are "just and reasonable" rates. *See generally* App. 14a-82a. On September 14, 2006, the District Court ruled that the MPSC had exceeded its jurisdiction as to these decisions; on appeal, the Eighth Circuit affirmed.

REASONS FOR DENYING THE WRIT

I. There Is No Circuit Split.

The Eighth Circuit's ruling is not contrary to or inconsistent with the Eleventh Circuit's decision in *NuVox Communications, Inc. v. BellSouth Communications, Inc.*, 530 F.3d 1330 (11th Cir. 2008). The issue on which the Eighth Circuit was asked to rule and did rule concerned the scope of State commission authority under Section 252 of the Act to arbitrate a BOC's provision of the checklist items contained in Section 271. Specifically, the issue presented was whether the MPSC could require SBC to provide to CLECs through arbitrated interconnection agreements local loops, local transport and local switching that are checklist items under Section 271 at rates the MPSC determined were "just and reasonable." The Eighth Circuit found that State commissions

have no authority to interpret or enforce the obligations of Section 271, holding that the FCC has exclusive jurisdiction over BOC compliance with the requirements of Section 271.

The MPSC is wrong in asserting that the Eighth Circuit's ruling is in conflict with the Eleventh Circuit's holding in *NuVox*. As the MPSC correctly States, the Eleventh Circuit concluded that the Florida Public Service Commission had properly determined that BellSouth must commingle wholesale services, including checklist items, with UNEs under the FCC's rulings in its *TRO* and in its Order on Remand, *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 F.C.C.R. 2533 (2005) ("*TRRO*"). The Eleventh Circuit's holding is expressly based upon 47 C.F.R. § 51.309(e) which requires ILECs to perform the tasks necessary to permit CLECs to commingle UNEs with wholesale services obtained from an ILEC, and upon FCC orders ruling that the checklist items of Section 271 are wholesale services. *NuVox*, 530 F.3d at 1333-1334.

The focus of Rule 51.309(e) and the FCC's statements on commingling in its *TRO* and *TRRO* is on CLECs' rights regarding UNEs; that is, what CLECs can do with UNEs under Section 251. A review of the FCC's various unbundling decisions reveals that in implementing Section 251 the FCC not only has identified the network elements that must be made available as UNEs, but also directed how they may be obtained and used, how they will be priced, and the extent to which the ILECs are obligated to assist in providing them. For example, the FCC ruled that the ILECs must perform the function of combining

UNEs, a decision that was upheld in *Verizon Communications, Inc. v. FCC,* 535 U.S. 467 (2002).

It is the FCC's determination regarding CLECs' rights and ILECs' obligations with respect to UNEs under Section 251 that was being implemented by the Florida Commission. The fact that the particular obligation being arbitrated involved CLECs' right to commingle UNEs with wholesale services that happened also to be Section 271 checklist items did not render the Eleventh Circuit's holding a ruling on State commission authority to arbitrate – to implement and enforce – the requirements of Section 271.

There is no conflict between the Eighth Circuit's ruling and the Eleventh Circuit's ruling.

II. The Eighth Circuit's Opinion Will Not Have the Far-Reaching Effect the Missouri Commission Claims.

In its Petition, the MPSC contends that the conflict between the Eighth Circuit and Eleventh Circuit decisions must be resolved to avoid undermining Congress's plan for dual State/federal responsibilities for implementing the Act. The MPSC is mistaken in reading the Eighth Circuit's ruling as preventing State commissions from addressing ILEC obligations to offer Section 271 checklist items with UNEs in arbitration proceedings. Where the FCC in implementing Section 251 of the Act has ruled that CLECs' right to obtain and use UNEs includes a right to commingle or otherwise use them with Section 271 checklist items, a State commission has the necessary authority, as part of its express authority under Section 252 to implement and enforce the requirements of Section 251, to ensure that interconnection agreements comply with the FCC's rules and orders

adopted under Section 251. Nothing in the Eighth Circuit's ruling alters or diminishes State commission authority in this regard. In a future arbitration proceeding, a State commission can require an ILEC that is a BOC to comply with all of the FCC's rules and orders governing unbundling under Section 251, including those that direct commingling of UNEs and wholesale services obtained under Section 271, without violating the Eighth Circuit's holding.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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